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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1971

FEBRUARY 7 THROUGH APRIL 19, 1972

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATA

217 U. S. 372, line 28: "jealously" should be "jealousy."

217 U. S. 373, line 5: "Stuarts" should be "Stuarts'."

392 U. S. 296–308, in running subhead, directly above the case title: "June 10, 1967" should be "June 10, 1968."

401 U. S. 481, line 2 from the bottom of syllabus: "Certiorari granted, 419 F. 2d 392; vacated and remanded . . . ." should be "Certiorari granted; 419 F. 2d 392, vacated and remanded . . . ."

404 U. S. 90, line 3 from bottom: "destitue" should be "destitute."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

JOHN N. MITCHELL, Attorney General.[1]
RICHARD G. KLEINDIENST, Acting Attorney General.[2]
ERWIN N. GRISWOLD, Solicitor General.
E. ROBERT SEAVER, Clerk.[3]
MICHAEL RODAK, Jr., Clerk.[4]
HENRY PUTZEL, jr., Reporter of Decisions.
FRANK M. HEPLER, Marshal.
HENRY CHARLES HALLAM, Jr., Librarian.

*For notes, see p. IV.

NOTES

[1] Attorney General Mitchell resigned effective the close of business March 1, 1972.

[2] The Honorable Richard G. Kleindienst, of Arizona, Deputy Attorney General, who became Acting Attorney General on the resignation of Mr. Mitchell, was nominated to be Attorney General by President Nixon on February 15, 1972.

[3] Mr. Seaver resigned as Clerk effective March 4, 1972.

[4] Mr. Rodak was appointed Clerk effective March 4, 1972. See *post*, p. 970.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

DEATH OF JAMES F. BYRNES

SUPREME COURT OF THE UNITED STATES

TUESDAY, APRIL 11, 1972

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

Today we take note with sadness of the death of former Justice James F. Byrnes in his 93d year. Justice Byrnes served on this Court in 1941 and 1942, at which time he resigned from the Court upon being appointed by President Roosevelt as Director of the Office of Economic Stabilization. Our sadness on the death of Mr. Justice Byrnes is tempered by the knowledge of the full and rich and remarkable life he lived, serving as he did in the House of Representatives, in the United States Senate, as Governor of the State of South Carolina, as Secretary of State, and as a Justice of this Court. He therefore served with great distinction at the highest levels in all three branches of Government, as well as in the highest office of his native State. His contributions to stability and peace following World War II have made his name honored among the statesmen of his time.

Few men have served their country so long or so well.

The record will show that adjournment of this Court today will be in memory of Mr. Justice Byrnes.

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF MR. JUSTICE BLACK*

TUESDAY, APRIL 18, 1972

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

The Court is in Special Session this afternoon to receive the Resolutions of the Bar in tribute to Mr. Justice Black. Before we commence the proceedings, I am requested to remind you that all present are invited by Mrs. Black and the Black family to attend the reception in the East Conference Room at the close of this proceeding.

Mr. Solicitor General Griswold addressed the Court as follows:

Mr. Chief Justice, may it please the Court:

At the meeting of the members of the Bar† of the Supreme Court just concluded, resolutions expressing

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*Mr. Justice Black, who retired from active service on September 17, 1971, died in Bethesda, Md., September 25, 1971 (404 U. S. III, VII). Services were held at Washington National Cathedral prior to his interment at Arlington National Cemetery on September 28, 1971.

†The Committee on Arrangements for the meeting of the Bar consisted of Solicitor General Erwin N. Griswold, Chairman, Mr. Benjamin V. Cohen, Mr. William T. Coleman, Mr. Leon Jaworski, and Mr. Edward Bennett Williams.

profound sorrow at the death of Justice Hugo Lafayette Black were offered by a committee‡ of which Mr. Louis Oberdorfer was Chairman.

Addresses and resolutions were presented by Mr. Bernard G. Segal of the Philadelphia Bar, by Professor Paul A. Freund of Cambridge, Massachusetts, and by Mr. George Saunders of the Illinois Bar.

The resolutions unanimously adopted are as follows:

Resolutions

We meet to honor the memory of Justice Hugo Lafayette Black.

To each Member of your Committee that memory is a vivid one—for Justice Black was a vivid man. Some of us knew him in his public life before he came to the Court; some of us knew him across the Bar in our appearances before this Court; some of us knew him by virtue of our service as his law clerks; some of us knew him as the attentive, inspiring Circuit Justice for the Fifth Circuit.

Vignettes from our memories abound.

Senator Sparkman, Congressman Pepper, and others of us first remember Justice Black as Senator Black—feared and fearless investigator, architect of New Deal legislation, Administration leader on the Senate Floor, Chairman of the Labor and Education Committee, and an influential Member of the Finance, Foreign Affairs, Military Affairs, and Rules Committees.

Their recollections from the 1930's picture Senator Black's desk piled high with volumes of American, English and ancient history and classics. He was then still heavily engaged in the compensatory liberal education

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‡The Committee on Resolutions consisted of Mr. Louis F. Oberdorfer, Chairman, Mr. Jerome A. Cooper, Mr. Thomas G. Corcoran, Professor Archibald Cox, Mr. Clifford J. Durr, Mr. John P. Frank, Mr. George C. Freeman, Jr., Mr. Marx Leva, Mr. Robert B. McCaw, Congressman Claude Pepper, Mr. J. Lee Rankin, Judge Richard T. Rives, Senator John Sparkman, Judge Elbert P. Tuttle, Mr. Lawrence G. Wallace, and Judge J. Skelly Wright.

which he had begun in 1926, while enjoying and making the most of the relative anonymity of a freshman Senator.

The advocates among us will most vividly remember Justice Black, senior Justice for over 25 of his 34 years on the Court, as he appeared on the bench—"dwarfed" alongside the several relatively substantial gentlemen who were successively his Chief Justices. When he could be seen from the Bar, he usually appeared tanned from tennis (even in the winter), gently rocking, alternately thumbing through briefs, or with his head slightly cocked, alertly watching counsel—often, it seemed, awaiting an appropriate moment to pounce a question in his inimitable Alabama manner.

One humbler counsellor recalls from an argument concerning the power of a Judicial Conference to control the work of a Federal District Judge, "the tone of disbelief" with which Justice Black put a question:

> "Mr. Justice Black: You mean that the President of the United States, in your judgment, has the power under our Constitution to determine whether a judge is mentally able to try his cases? Is that what you are saying?
>
> "Mr. Wright: I am saying exactly that; yes, sir.
>
> "Mr. Justice Black: I think I understand you now."

According to the counsellor, Justice Black "leaned far back in his chair, shaking his head but with a twinkle in his eye." [1]

In a last colloquy with counsel Justice Black evoked from the Solicitor General a concession which the Justice, with obvious relish, built into his last opinion:

> "You [Mr. Justice Black] say that no law means no law, and that should be obvious. I [the Solicitor General] can only say, Mr. Justice, that to me it is equally obvious that 'no law' does not mean

[1] Wright, Hugo L. Black: A Great Man and a Great American, 50 Tex. L. Rev. 1, 2–3 (1971).

'no law,' and I would seek to persuade the Court that that is true. . . ." [2]

Those of us who were law clerks to Justice Black have shared a special precious privilege. We have, in our small ways, assisted and closely observed the steely disciplined working habits of a self-taught scholar as he resurrected from his own reading and experience and propagated with his own carefully penned eloquence a fresh, authentic and now widely—though not universally—accepted appreciation of the genius of our Nation's written Constitution. In the process we have pitted, or attempted to pit, ourselves in intellectual combat against what Justice Cardozo once described as one of the most brilliant legal minds he had ever known.[3]

Our privilege included a brief but intimate membership in a family presided over by a very great man, deeply in love with his wife and not ashamed to show it. We have observed firsthand how even the greatest of men can be inspired to greater heights of effort and insight by the unflagging support and admiration of a loved and loving wife.

The bonds between Justice Black and his law clerks did not end with the termination of each law clerk's service. They were renewed by frequent visits, correspondence and formal gatherings for important anniversaries and birthdays. On his 80th birthday, Justice Black spoke to his clerks and their wives about the disadvantages and advantages of growing old. The disadvantages were obvious enough and he related some. There were also surprising advantages: "As one grows old, one needs less sleep. That," said Justice Black, "gives that much more time to work."

One of Justice Black's law clerks recently wrote an extremely popular, but controversial, book.[4] It was Jus-

[2] *New York Times Co.* v. *United States*, 403 U. S. 713, 717–718 (1971) (Black, J., concurring).

[3] Hazel Black Davis, Uncle Hugo: An Intimate Portrait of Mr. Justice Black 54 (1965) (privately printed).

[4] C. Reich, The Greening of America (1970).

tice Black's habit to focus on his reading by heavy underscoring and frequent longhand penciled marginal notes. Justice Black's copy of this law clerk's book carries in its margin some trenchant annotations.

The author wrote of the glory of the original American dream of a free democratic society, observing sadly that:

> "Less than two hundred years later, almost every aspect of the dream has been lost. In this chapter we shall be concerned with the forces that destroyed the American dream . . . ." [5]

In the margin Justice Black wrote in heavy pencil:

> "I do not agree. It is not yet destroyed."

The law clerk-author, striving to identify a new set of values for our society, bluntly disparaged the old. He wrote:

> "[Our earliest generation known as] Consciousness I believes that the American dream is still possible, and that success is determined by character, morality, hard work, and self-denial. . . ." [6]

In the margin Justice Black's longhand note proclaimed: "I still do."

The judges of the Fifth Circuit have been favored for many years by the inspiring presence of Justice Black at their annual Judicial Conferences. The last 18 years have been trying ones for Fifth Circuit Judges. Justice Black shared those trials while he provided leadership and reassurance that "this, too, will pass." The Fifth Circuit Judges appreciate, perhaps more than others, the full implications of Justice Black's role in this Court's steadfast effort to eliminate unconstitutional discrimination in our land. He was the only Justice from the Deep South when the Court decided *Brown*. As on other occasions when he was personally attacked, he silently suffered with manly dignity the unpleasant reprisals inflicted upon him and his loved ones in the South. Nor

[5] *Id.*, at 21.
[6] *Id.*, at 25.

did he flinch in his determination to see it through. As a single Circuit Justice he finalized the order for the admission of James Meredith to the University of Mississippi, the enforcement of which required a substantial military operation. As Circuit Justice, and with the full Court, he eliminated the "all deliberate speed" concept as a brake on school desegregation.[7]

In an informal farewell address to one of the last Judicial Conferences of his Circuit which he attended Justice Black spoke of his pride in the way the Southern federal judges had performed their difficult and often unpopular duty of applying the Constitution and enforcing the civil rights laws, particularly with respect to the *Brown* decision. He reminded them of the constancy of controversy and his belief that he and they were strengthened by it. In conclusion he told them good-by. He said:

> "I have been coming to see you for thirty years, how many more I cannot know. I, too, like many of the judges I have seen here, have passed over the crest, over the brow of the hill. I hope I have learned more tolerance, more friendship, more about the love of human kindness during those thirty years.
>
> "Now I am far beyond the crest. I look over into the glowing rays that come with sunset. The years have been happy for me; the people have been good to me. I have no complaint about my life, and as I look at those rays they do not frighten me. I know that life is change, and the greatest change of all is who is to be here at any certain period. All that I can say and hope for is that my career has been such that people of integrity of thought, when they think about me, will picture a person who tried his dead level best to serve his people and his country with every ounce of energy, love and devotion that he could muster in his life,

[7] *Alexander* v. *Holmes County Bd. of Ed.*, 396 U. S. 1218 (1969) (Black, J., in chambers).

> and that, when those rays cease to be in my vision, each of you and every member of this Conference will remember me as one who did his best."

For most of his years on the Bench Justice Black adhered to a strictly ascetic view of a judge's role and made no serious public statements. In his later years he relented to the extent of delivering the first James Madison Lecture on the First Amendment, explaining his philosophy of the Constitution in an hour-long television special entitled "Mr. Justice Black and the Bill of Rights," and delivering the Carpentier Lectures at Columbia University. In the latter he undertook to state "in simple and clear language" his "constitutional faith." He opened the Lectures with the observation that:

> "It is of paramount importance to me that our country has a written constitution. This great document is the unique American contribution to man's continuing search for a society in which individual liberty is secure against governmental oppression." H. Black, A Constitutional Faith 3 (Carpentier Lectures) (1969).

Justice Black continued with simple eloquence to express his faith in the Constitution as an ingenious instrument to be invoked by the Supreme Court to assure control of government by the people subject to restraints specifically embodied in the Constitution primarily to limit government power and to protect minorities from majorities.

Justice Black's deep faith in the Constitution expressed near the end of his long service on this Court was built upon rich experience as an active, successful trial lawyer, a fair and efficient municipal court judge, a vigorous prosecutor, candidate for public office, and as United States Senator.[8] His time on the Court began as the country struggled to design solutions for the social

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[8] For a posthumous account of Justice Black's pre-Court years, see V. Hamilton, Hugo Black, The Alabama Years (1972).

and economic problems generated and widened by the great depression. It continued through World War II, the Cold War confrontations with their corollary domestic shock waves, the conflicts which followed in the wake of the *Brown* decision and finally, in the 1960's, the violence of assassinations, street crime, increased racial tension and an unpopular war.

In his later years, he sparred with commentators and colleagues who claimed that his fundamental views had changed with these changing times. He disagreed:

> "I think that I can say categorically that I have not changed my basic constitutional philosophy—at least not in the last forty years." [9]

He convinced at least one commentator who recently concluded:

> "The remarkable thing about him was not his ability to change with the times, but the timelessness of the values of justice, freedom, and human dignity which he held so dear, and for which he fought." [10]

Justice Black came to the Court committed, as a Senator, to the view that popular control of the government was frustrated by what he deemed to be excessive judicial restraints drawn from the Due Process Clause and the Commerce Clause of the Constitution.[11] From the beginning to the end of his service he fought what he considered to be unauthorized efforts of judges to supersede the judgment of voters and their elected representatives with the judges' views of appropriate remedies for social and economic problems.[12]

Justice Black also came to the Court convinced that

---

[9] H. Black, A Constitutional Faith xvi (1969).

[10] Durr, Hugo Black, A Personal Appraisal, 6 Ga. L. Rev. 1.

[11] See, *e. g.*, 76 Cong. Rec. 1443–1444 (1933).

[12] See, *e. g.*, Hugo L. Black, "Reorganization of the Federal Judiciary," a radio address reported in N. Y. Times, Mar. 30, 1937; *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945) (Black, J., concurring).

it had an affirmative responsibility to make other branches of the National Government as fully responsive to the will of the people as was consistent with orderly process and protection of minorities. His experience and reading reinforced his faith in the practical wisdom of the separation of powers effected by the Constitution between the Executive, Legislative and Judicial branches of Government and between the National Government and the States. He repeatedly urged the Court to review and strike down attempts by the Executive to legislate, adjudicate or engage in activity proscribed, or not plainly authorized;[13] by the Legislature to adjudicate or enforce through Congressional Committees or by personal legislation resembling bills of attainder;[14] and

[13] "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States. . . .'

. . . . . .

"The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 587–589 (1952). See also, *Gregory* v. *Chicago*, 394 U. S. 111, 120 (1969) (Black, J., concurring).

[14] "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. . . . When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder." *United States* v. *Lovett*, 328 U. S. 303, 317–318 (1946).

by the Judiciary to legislate or administer.[15] Any significant weakening of the careful separation contemplated by the Constitution could, he believed, lead to an inordinate accretion of power in one or another of the branches which would tempt the overreaching branch to destroy or undermine the others and then turn, unfettered, upon the people, frustrating their will and tyrannically abusing their liberties.

As Justice Black was helping to confine the power of judges to restrain the people's elected representatives from addressing themselves to solutions of pressing social and economic needs, he also sought to direct the Court's prestige and power toward what he conceived as primary roles which were fashioned for it by the plain words of the Constitution. Drawing on his experience as a prosecutor, a judge and a Senator, he used simple but eloquent language to focus and renew the attention of his Brethren and the public upon three particular elements of orderly government by the people under our Constitution: full adherence to the procedural protections of the Bill of Rights and other provisions of the Constitution designed to protect the individual from abuse of government power; free and universal access to the political process; and absolute freedom of speech, belief and thought.

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[15] Justice Black's insistence that the judiciary stay within the province of deciding specific cases presented to it by litigants is probably best demonstrated by his repeated dissents from the Court's promulgation of rules, such as the Federal Rules of Civil Procedure. See, *e. g.*, Statement of Mr. Justice Black and MR. JUSTICE DOUGLAS, 374 U. S. 865–866 (1963):

"We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our judgment, the Constitution requires to be initiated in and enacted by the Congress and approved by the President. The Constitution, as we read it, provides that all laws shall be enacted by the House, the Senate and the President, not by the mere failure of Congress to reject proposals of an outside agency."

I

In his grand jury investigation of police brutality and other firsthand experience while serving as Solicitor of Jefferson County, Alabama, Hugo Black had witnessed the helplessness of the poor and the unfortunate when confronted by the power of government and the corrupting effect of official lawlessness. A 1915 Grand Jury investigating police brutality in Bessemer, Alabama, had filed a report (very likely written for it by the special prosecutor who conducted the investigation, Hugo Black) which concluded:

> "A man does not forfeit his right . . . to be treated as a human being by reason of the fact that he is charged with or an officer suspects that he is guilty of a crime. Instead of being ready and waiting to strike a prisoner in his custody, an officer should protect him. . . . Such practices are dishonorable, tyrannical and despotic and such rights must not be surrendered to any officer or set of officers, so long as human life is held sacred and human liberty and human safety of paramount importance." [16]

In his third term on the Supreme Court Justice Black was confronted by a case in which his Alabama experience and his constitutional philosophy merged to produce an early, and possibly immortal, expression of the role of the courts in providing fair trials for the helpless citizen threatened by government. In *Chambers* v. *Florida*, 309 U. S. 227, 240–241 (1940), four young Negro tenant farmers petitioned the Court to reverse their murder convictions based on confessions obtained after seven days of uninterrupted grilling. Justice Black's majority opinion in that case struck a note which he resounded again and again over the years:

> "We are not impressed by the argument that law enforcement methods such as those under re-

[16] See Birmingham Age-Herald, Sept. 18, 1915.

> view are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our Constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."

Justice Black also knew from his own experience as prosecutor and defense counsel that a defendant could seldom, if ever, receive a just trial without representation by an attorney. How could a defendant, even one released on bail, marshall the facts? How could he comprehend the legal questions? How could he avoid the procedural pitfalls and traps built into the criminal justice system? How could he approach the bench and address the learned judge? How could he choose the jury?

In a 1942 case, involving a poor unemployed farm hand who was tried without the aid of counsel and convicted, Justice Black stated his strongly held view, which he believed he shared with the men who wrote the Sixth Amendment, that a lawyer is indispensable

to a defendant on trial for his liberty. *Betts* v. *Brady*, 316 U. S. 455, 476–477 (1942) (Black, J., dissenting). While Justice Black's dissent argued that the Fourteenth Amendment made the Sixth Amendment applicable to the States, he also maintained that:

> "A practice cannot be reconciled with 'common and fundamental ideas of fairness and right,' which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented. . . .
>
> . . . . . .
>
> "[N]o man [should] be deprived of counsel merely because of his poverty. Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law."

As Justice Black wrote his *Chambers*, *Betts* and related opinions and studied the history of the Constitution and its Amendments, he began, in the 1940's, to question the validity of the process by which his predecessors and colleagues selected concepts or provisions from the Bill of Rights to apply to the States while rejecting others. His study convinced him that the draftsmen of the Bill of Rights had designed a nearly perfect device for use by courts in protecting individual liberty and the democratic process from the natural tyranny of government by men with power, and that the genius of the Bill of Rights had been fully appreciated by the framers of the Fourteenth Amendment when they were selecting a mechanism to protect the citizens of the States, particularly Negro citizens, from the tyranny of state government power. The Fourteenth Amendment framers had quite understandably and naturally turned to the honored and tested Bill of

Rights as the means of extending specific Federal constitutional protections to all levels of government, instead of trying to fashion some vague new formula, such as rights "implicit in the concept of ordered liberty," as the means of carrying out their purpose. His diligent study and persistent search for basic principles bore fruit in *Adamson* v. *California*, 332 U. S. 46 (1947), where his dissent laid the cornerstone for much of the rest of his life's work. He wrote there:

> "I cannot consider the Bill of Rights to be an outworn Eighteenth Century 'strait jacket' as the *Twining* opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights

will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution." *Id.*, at 89.

Upon this foundation he rested his many forceful opinions insisting not only that the Bill of Rights restrained the power of state governments but also that each Amendment applied with exactly the same meaning, force and effect to the States as it applied to the Federal Government.

Although in Justice Black's lifetime the full Court did not adopt his view that the Fourteenth Amendment had incorporated the Bill of Rights, and it has been the subject of considerable controversy,[17] there is little doubt about the impact of the *Adamson* dissent. By the time Justice Black left the bench almost all the elements of the Bill of Rights had been applied to the States.

A charming by-product of Justice Black's effort to make the Bill of Rights applicable to the States through the Fourteenth Amendment was one of the most intense intellectual contests and one of the closest friendships of Justice Black's life, both with Justice John Marshall Harlan. Justice Black often said that his fear of the power of judges, undoubtedly strengthened by the Court's substantive due process opinions in the 1920's and 1930's, would have little foundation if judges were all like Justice Harlan. It is a happy vignette of judicial history and a tribute to both men that their friendship grew and flourished in the midst of their vigorous debate. The story of that friendship had its final chapter in adjacent rooms at Bethesda Naval Hospital; the friendly struggle will probably be carried on by the disciples of each Justice.

The "incorporation" theory of the Fourteenth Amendment and Justice Black's fight for counsel in all crim-

[17] Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5 (1949).

inal cases came together in the Court's 1963 decision that the Sixth Amendment, made applicable to the States by the Fourteenth, requires that every defendant charged with a crime must be offered counsel by the State if he is without means to hire his own. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). In vindication of his dissent in *Betts* v. *Brady,* Justice Black recorded the Court's recognition that:

> "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. . . ." *Id.,* at 344.

Justice Black's belief in the vital role of counsel in criminal cases was reflected in his efforts to limit the contempt power of judges, particularly as related to lawyers' vigorous in-court efforts to defend their clients. He viewed the authority vested in a single life-tenured jurist to punish a lawyer for contempt after a trial on account of the lawyer's conduct of that trial as an anathema to the very concept of the Bill of Rights. In *Sacher* v. *United States,* 343 U. S. 1 (1952), for example,

Justice Black dissented from the affirmance of a summary criminal contempt sentence imposed by a United States District Judge upon attorneys who had energetically defended their Communist clients. He wrote:

> "Unless we are to depart from high traditions of the bar, evil purposes of their clients could not be imputed to these lawyers whose duty it was to represent them with fidelity and zeal. Yet from the very parts of the record which [the trial judge] specified, it is difficult to escape the impression that his inferences against the lawyers were colored, however unconsciously, by his natural abhorrence for the unpatriotic and treasonable designs attributed to their Communist leader clients. It appears to me that if there have ever been, or can ever be, cases in which lawyers are entitled to a full hearing before their liberty is forfeited and their professional hopes are blighted, these are such cases." *Id.*, at 19.
>
> "Are defendants accused by judges of being offensive to them to be conclusively presumed guilty on the theory that judges' observations and inferences must be accepted as infallible? There is always a possibility that a judge may be honestly mistaken. Unfortunately history and the existence of our Bill of Rights indicate that judicial errors may be from worse causes." *Id.*, at 22.

The Bar's fond memories and high admiration for Justice Black may reflect his manifest faith in adversary proceedings in court as the best means to do justice. His opinion for the Court in *Gideon* v. *Wainwright* displayed his commitment to the vital role of lawyers in the adversary process. In *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964), Justice Black's opinion for the Court upholding the right of unionized workers on the railroad

to associate and seek legal advice in implementing their rights under federal laws enacted for their benefit said:

> "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries . . . and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics. The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped." *Id.*, at 7.

Securing access to counsel for the injured and the aggrieved was for Justice Black the easier part of the issue. He worked harder and longer against efforts of government officials, judges and bar association committees to stifle change and peaceful dissent from the *status quo* by disciplining and thereby intimidating or excluding lawyers who failed to conform to current notions of "loyalty" or who refused to submit to a searching examination of their personal beliefs and ties. His years on the Bench through World War II, the Joseph McCarthy Era and the desegregation struggle confronted Justice Black and the Court with repeated instances in which courts and the Organized Bar sanctioned or attempted to sanction courageous lawyers who stood up for their clients' beliefs and constitutional privileges and who vigorously defended unpopular causes. Over Justice Black's classic dissents, a divided Court in 1961 affirmed decisions banning Raphael Konigsberg and George Anastaplo from the legal profession.

In *Konigsberg* v. *State Bar of California*, 366 U. S. 36 (1961), and *In re Anastaplo*, 366 U. S. 82 (1961), Justice Black eloquently documented his unshakable belief in the honorable role of courageous, unorthodox lawyers. In *Anastaplo* he said:

> "This case illustrates to me the serious consequences to the Bar itself of not affording the full protections of the First Amendment to its applicants for admission. For this record shows that Anastaplo has many of the qualities that are needed in the American Bar. It shows, not only that Anastaplo has followed a high moral, ethical and patriotic course in all of the activities of his life, but also that he combines these more common virtues with the uncommon virtue of courage to stand by his principles at any cost. It is such men as these who have most greatly honored the profession of the law—men like Malsherbes, who, at the cost of his own life and the lives of his family, sprang unafraid to the defense of Louis XVI against the fanatical leaders of the Revolutionary government of France—men like Charles Evans Hughes, Sr., later Mr. Chief Justice Hughes, who stood up for the constitutional rights of socialists to be socialists and public officials despite the threats and clamorous protests of self-proclaimed super patriots—men like Charles Evans Hughes, Jr., and John W. Davis, who, while against everything for which the Communists stood, strongly advised the Congress in 1948 that it would be unconstitutional to pass the law then proposed to outlaw the Communist Party—men like Lord Erskine, James Otis, Clarence Darrow, and the multitude of others who have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thor-

> oughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it." *Id.*, at 114–116.

His stirring dissent in *Anastaplo*, quoted above, led to a long exchange of letters with the unsuccessful petitioner and, more importantly, to an ultimate change of the Court's position. *Baird* v. *State Bar of Arizona*, 401 U. S. 1 (1971); *In re Stolar*, 401 U. S. 23 (1971).

For Justice Black the constitutional guarantees of a jury trial in all criminal and most civil cases embodied in the Sixth and Seventh Amendments provided essential flexibility in the administration of justice and an ultimate restraint on possible abuse of power by judges. The jury, consisting of men drawn from the community to hear a particular dispute, was an institution with which Hugo Black had shared great experiences. Perhaps these experiences and his diligent study of English history led him to agree with Alexander Hamilton that the citizens who ratified the Constitution could be divided "between those who thought that jury trial was a 'valuable safeguard to liberty' and those who thought it was 'the very palladium of free government.'" *Galloway* v. *United States*, 319 U. S. 372, 397–398 (1943) (Black, J., dissenting). His efforts to emphasize and strengthen the jury's role as a counterbalance to the power of judges are typified by his opinions that a jury trial should be afforded in contempt proceedings in which the judge might otherwise be the unrestrained accuser, prosecutor and arbitrator of the sentence. See, *e. g.*, *United States* v. *United Mine Workers*, 330 U. S. 258, 328 (1947) (Black and DOUGLAS, JJ., concurring in part and dissenting in part). His view was perhaps best expressed in *United States* v. *Barnett*, 376 U. S. 681 (1964). He wrote in dissent:

> "No provisions of the Constitution and the Bill of Rights were more widely approved throughout the new nation than those guaranteeing a right to trial by jury in all criminal prosecutions. . . . They

> were adopted in part, I think, because many people knew about and disapproved of the type of colonial happenings . . . in which . . . people had been sentenced to be fined, thrown in jail, humiliated in stocks, whipped, and even nailed by the ear to a pillory, all punishments imposed by judges without jury trials. Unfortunately, as the Court's opinion points out, judges in the past despite these constitutional safeguards have claimed for themselves 'inherent' power, acting without a jury and without other Bill of Rights safeguards, to punish for criminal contempt of court people whose conduct they find offensive. This means that one person has concentrated in himself the power to charge a man with a crime, prosecute him for it, conduct his trial, and then find him guilty. I do not agree that any such 'inherent' power exists. Certainly no language in the Constitution permits it; in fact, it is expressly forbidden by the two constitutional commands for trial by jury." *Id.*, at 725–726.

Justice Black was not deflected from his insistence upon the strict application of the Bill of Rights to individual cases, including the right to trial by jury, by the prospect that some defendants who had, in fact, committed crimes would, on occasion, escape the consequences of these crimes. In a rare public interview on a national television special, he stated:

> "Why did they write the Bill of Rights? [The first ten Amendments] practically all relate to the way cases shall be tried, and practically all of them make it more difficult to convict people of crime. What about guaranteeing a man a right to a lawyer? Of course, that makes it more difficult to convict him. What about saying that he shall not be compelled to be a witness against himself? That makes it more difficult to convict him. . . . They were every one intended to make it more difficult before the doors of a prison closed on a man. . . ." CBS

News Special: Mr. Justice Black and the Bill of Rights, Library of Congress Motion Picture Collection, FBA 6334, Reel 2, 600–650 feet.

However, his concern for law enforcement never faded. In cases where he felt that a majority of the Court unreasonably expanded the scope of the Fourth Amendment proscription against "unreasonable" searches and seizures, he chided them:

> "It is difficult for me to believe the Framers of the Bill of Rights intended that the police be required to prove a defendant's guilt in a 'little trial' before the issuance of a search warrant. . . . [E]avesdroppers were deemed to be competent witnesses in both English and American courts up until this Court in its Fourth Amendment 'rule-making' capacity undertook to lay down rules for electronic surveillance. . . . The reasonableness of a search incident to an arrest, extending to areas under the control of the defendant and areas where evidence may be found, was an established tenet of English common law, and American constitutional law after adoption of the Fourth Amendment—that is, until *Chimel* v. *California,* 395 U. S. 752 (1969). The broad, abstract, and ambiguous concept of 'privacy' is now unjustifiably urged as a comprehensive substitute for the Fourth Amendment's guarantee against 'unreasonable searches and seizures.' *Griswold* v. *Connecticut,* 381 U. S. 479 (1965).
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> "Our Government is founded upon a written Constitution. The draftsmen expressed themselves in careful and measured terms corresponding with the immense importance of the powers delegated to them. The Framers of the Constitution, and the people who adopted it, must be understood to have used words in their natural meaning, and to have intended what they said. The Constitution itself

contains the standards by which the seizure of evidence challenged in the present case and the admissibility of that evidence at trial is to be measured in the absence of congressional legislation." *Coolidge* v. *New Hampshire,* 403 U. S. 443, 499–500 (1971) (Black, J., concurring and dissenting).

In Justice Black's view an orderly courtroom was also a necessary ingredient for the conduct of a fair trial. This view was forcefully expressed in his opinion outlining the sanctions available to a judge faced with an obstreperous defendant in the courtroom. His opinion for the Court in *Illinois* v. *Allen,* 397 U. S. 337, 346–347 (1970), states:

"It is not pleasant to hold that the respondent Allen was properly banished from the court for a part of his own trial. But our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. Nor can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him. It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes. As guardians of the public welfare, our state and federal judicial systems strive to administer equal justice to the rich and the poor, the good and the bad, the native and foreign born of every race, nationality, and religion. Being manned by humans, the courts are not perfect and are bound to make some errors. But, if our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case. . . ."

II

Justice Black's work reflects his concept that a second major role of the Court under the Constitution was to open the channels of the political process. During his service on the Court controversies about popular control of government appeared in diverse forms. When Justice Black came to the bench, electoral equality generally was far from a reality. The Court regarded reapportionment as a "political thicket" to be avoided.[18] Justice Black, however, saw the threat to our constitutional form of government in self-perpetuating "rotten boroughs" as a responsibility of the Court as interpreter and enforcer of the Constitution. For him the right to an undiluted vote was "too important in our free society to be stripped of judicial protection." [19] In his dissenting opinion in *Colegrove* v. *Green,* 328 U. S. 549, 566 (1946), he forecast not only penetration of the reapportionment thicket but also the ultimate "one-man, one-vote" standard adopted by the Court in *Reynolds* v. *Sims,* 377 U. S. 533 (1964).

In the South, the controversies about access to the political process focused on racial discrimination. At a time when the South was considered by many an eccentric pocket of racial discrimination, in contrast with the rest of the Nation, Justice Black spoke of the people of the South as decent and compassionate human beings, who, he believed, could, with leadership, live down the tragedies of slavery, the Civil War, Reconstruction, and segregation. His opinions stressed that equal education and equal suffrage were the principal means to total equality under law. Perhaps his Senate campaign days, stumping the State of Alabama, led him to believe that no right could create the respect for a man or recognition of his views by elected officials like his right to

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[18] *E. g., Colegrove* v. *Green,* 328 U. S. 549, 556 (1946).

[19] *Wesberry* v. *Sanders,* 376 U. S. 1, 7 (1964).

vote for local, county, state, and federal officers.[20] But he dissented from the Court's decisions upholding regional sanctions against voting discrimination which he viewed as penalties against the Southern States reminiscent of Reconstruction.[21]

By the time Justice Black died, the face of the South had changed dramatically. School desegregation spurred by *Alexander* v. *Holmes County Bd. of Ed.*, 396 U. S. 19 (1969), had produced more school integration in the South than in the North. Negro officials sat in state legislatures for the first time since Reconstruction and various cities and towns had black mayors or aldermen. A new spirit of warmth and moderation pervaded Southern politics replacing the bluster of massive resistance.

When specific groups were disenfranchised or forced to forfeit full political participation, Justice Black defended them. For example, he dissented from the Court's opinion sustaining the constitutionality of the Hatch Act, which barred public employees from engaging in political activity.

> "The section of the Act here held valid reduces the constitutionally protected liberty of several million citizens to less than a shadow of its substance. It relegates millions of federal, state, and municipal employees to the role of mere spectators of events upon which hinge the safety and welfare of all the people, including public employees. It removes a sizable proportion of our electorate from full participation in affairs destined to mold the fortunes of the nation. It makes honest participation in essential political activities an offense punishable by proscription from public employment. It endows a

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[20] Voter registration, facilitated by court decisions and new federal legislation, had established the Southern Negroes as a potent political force, particularly in local affairs.

[21] *South Carolina* v. *Katzenbach*, 383 U. S. 301, 355 (1966) (Black, J., concurring and dissenting); *Perkins* v. *Matthews*, 400 U. S. 379, 401 (1971).

> governmental board with the awesome power to censor the thoughts, expressions, and activities of law-abiding citizens in the field of free expression from which no person should be barred by a government which boasts that it is a government of, for, and by the people—all the people. Laudable as its purpose may be, it seems to me to *hack at the roots of a Government by the people themselves;* and consequently I cannot agree to sustain its validity." *United Public Workers* v. *Mitchell,* 330 U. S. 75, 115 (1947). (Emphasis added.)

In *Williams* v. *Rhodes,* 393 U. S. 23 (1968), Justice Black led the Court to take another step toward equal access for all to the ballot box by coming to the aid of a political candidate, whose views and actions Justice Black may well have abhorred. The American Independent Party candidate for President had been denied a place on the ballot because he had failed to secure sufficient petition signatures by the appropriate date. In striking down the complex rules which infringed on George Wallace's right to become a candidate, Justice Black wrote:

> "In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Similarly we have said with reference to the right to vote: 'No right is more precious in a free country than

that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'" *Id.*, at 30–31.

III

The third area in which Justice Black sought to fulfill the goals of the Founding Fathers, as he perceived them, and the area in which his constitutional faith attracted the greatest public attention involved what Oliver Wendell Holmes called the "free trade of ideas." In a real sense, Justice Black viewed the First Amendment as the foundation of the American democratic process—the foundation that permitted a man to conceive an idea, to express it, and to associate with other men of like persuasion to further their common interests. It would be difficult to find better words to express this belief in the First Amendment than those chosen by Justice Black himself early in his Court career. In February 1941, less than four years after he was appointed to the Court, he wrote:

"I view the guaranties of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. *Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body.* In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287 (1941) (dissenting opinion). (Emphasis added.)

Like the human heart, the liberty which is the core of a democratic government requires the greatest protection in times of severe stress, such as war or social upheaval. In each such time of crisis, Justice Black

stood beside the First Amendment against a tide of popular opinion so aroused in opposition to a common "enemy" that it often failed to recognize the self-destructive consequences of its own actions. Justice Black saw the threat which he communicated with eloquent simplicity in his dissents:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. . . ." *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 137 (1961).

After World War II, sentiment was strong against persons of German descent. When the Court upheld the deportation of a German alien who was alleged to be "dangerous to the public peace and safety" under the Alien Enemy Act, Justice Black dissented, drawing an analogy to the 1798 Alien and Sedition Acts. He wrote:

> "[T]he First Amendment represents this nation's belief that the spread of political ideas must not be suppressed. And the avowed purpose of the Alien Enemy Act was not to stifle the spread of ideas after hostilities had ended. Others in the series of Alien and Sedition Acts did provide for prison punishment of people who had or at least who dared to express political ideas. I cannot now agree to an interpretation of the Alien Enemy Act which gives a new life to the long repudiated anti-free speech and anti-free press philosophy of the 1798 Alien and Sedition Acts. I would not disinter that philosophy which the people have long hoped Thomas Jefferson had permanently buried when he pardoned the last person convicted for violation of the Alien and Sedition Acts." *Ludecke* v. *Watkins,* 335 U. S. 160, 181–183 (1948).

The Korean conflict brought on another cycle of public harassment of allegedly or potentially disloyal citizens, Communists and their sympathizers. Justice Black's resistance to the extraordinary measures taken by a fearful government and its frightened citizens brought him much personal abuse. The personal attacks only strengthened his faith and heightened the insight and courage that he embodied in his written memorials to free speech. His dissent on behalf of eleven American Communist Party leaders at the height of the Korean War in *Dennis* v. *United States*, 341 U. S. 494 (1951), is one such memorial:

> "The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. . . ." *Id.*, at 580.
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> "Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society." *Id.*, at 581.

Even before Cold War tensions had relaxed, the Nation and the Court were confronted by the inevitable tensions generated by the American Negro's increasingly successful struggle for equality. The marches, demonstrations, sit-ins, and confrontations of the 1960's presented new challenges, both to free speech and to an orderly society. In *Cox* v. *Louisiana*, 379 U. S. 559 (1965), Justice Black emphasized the careful distinction between speech and conduct which he believed necessary

simultaneously to provide protection to the rights of individuals to associate for the advancement of their beliefs and to protect the public against incipient and actual violence and intimidation of the orderly functioning of government and the courts. He wrote:

> "The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly *where people have a right to be for such purposes.* This does not mean, however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling, whether on publicly owned streets or on privately owned property. Were the law otherwise, people on the streets, in their homes and anywhere else could be compelled to listen against their will to speakers they did not want to hear. Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment." *Id.*, at 578 (concurring and dissenting).

As the social unrest concentrated in the South in the early 1960's turned to urban riots elsewhere in America in the late 1960's, many who feared anarchy were ready to weaken the rights of free speech and free assembly to re-establish more rigid order. Disorderly conduct and trespassing convictions appeared frequently on the Court's docket. Many Supreme Court decisions were misconstrued by large segments of the public who viewed them either as too restrictive or too permissive, depending upon their individual persuasions. In *Gregory* v. *Chicago,* 394 U. S. 111 (1969), Justice Black again attempted to find the safe channel between speech and conduct, between rights protected by the First Amendment and actions subject to legislative regulation. Comedian Dick Gregory had conducted an orderly march through Chicago in the face of hecklers. The Illinois

courts had found that he had been completely law-abiding until policemen, concerned that the hecklers would provoke a breach of the peace, had ordered Gregory and his demonstrators to disperse. When they failed to leave, they were arrested and charged with disorderly conduct. Concurring in the Court's opinion reversing the conviction, Justice Black said:

> "[U]nder our democratic system of government, lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat. Laws, that is valid laws, are to be made by representatives chosen to make laws for the future, not by police officers whose duty is to enforce laws already enacted and to make arrests only for conduct already made criminal. . . . To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws." *Id.*, at 120.

However, Justice Black offset his concurrence in the reversal of Gregory's conviction with a clear warning that in his view conduct can be and should be regulated to protect other people, their families, their homes and their serenity. In the same opinion he wrote:

> "Speech and press are, of course, to be free, so that public matters can be discussed with impunity. But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." *Id.*, at 125–126.

Justice Black believed that the First Amendment was designed to protect individual men. He was unwilling to "balance" away the rights of any individual person

for some higher governmental purpose. In *Barenblatt* v. *United States,* 360 U. S. 109 (1959), Justice Black expressed his belief that the protection provided by the First Amendment enabling individual men and women to voice their beliefs and ensuring that other persons could hear the speaker was itself one of the highest purposes of the Founding Fathers of the Republic. He said:

> "[E]ven assuming what I cannot assume, that some balancing is proper in this case, I feel that the Court after stating the test ignores it completely. At most it balances the right of the Government to preserve itself, against Barenblatt's right to refrain from revealing Communist affiliations. Such a balance, however, mistakes the factors to be weighed. In the first place, it completely leaves out the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political 'mistakes' without later being subjected to governmental penalties for having dared to think for themselves. It is this right, the right to err politically, which keeps us strong as a Nation. . . ." *Id.,* at 144 (dissenting opinion).

Justice Black's appreciation of the value to society as a whole from enforcement of the First Amendment to protect the speech and writings of one individual is also reflected in his opinions interpreting the freedom of religion elements in the First Amendment. He gave to the Free Exercise and No Establishment of Religion Clauses of the First Amendment the same sympathetic consideration that he devoted to the speech and free press guarantees. He treated these provisions as interrelated devices to protect the American heritage of freedom. In fact, the decision in *Reynolds* v. *United States,* 98 U. S. 145 (1879), in which the Court upheld the prohibition against polygamy, even as applied to Mormons who had more than one wife as a profession of

their religious beliefs, apparently led him to the speech-conduct differentiation which for him marked the limits of the First Amendment's protections.

Justice Black sat on the bench during times when religious freedom was subjected to intense pressures from competing social forces. Parochial schools and their sponsors sought public aid to meet the ever-rising costs of education, while minority religious groups attacked flag salutes, school prayer services and Sunday closing laws. These questions were not easy for Justice Black to decide and upon reflection he was unable to reconcile his first judgment as a Justice with the First Amendment. *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940). In *Jones* v. *Opelika*, 316 U. S. 584 (1942), and *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), he admitted his error. In his concurring opinion in *Barnette*, he expressed his profound respect for freedom of belief and thought:

> "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity. Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction

is a form of test oath, and the test oath has always been abhorrent in the United States.

"Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.

"Neither our domestic tranquillity in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. . . ." *Id.*, at 643–644.

After his initial uncertainty over the meaning of the First Amendment prohibition on government interference in religion, Justice Black wrote three landmark decisions on the relationship between church and state. His *Everson* opinion for the Court, holding that New Jersey could constitutionally pay a school transportation subsidy to parents of school children, including parents who used the subsidy to send their children to religious schools, is usually cited as precedent for the limited nature of governmental power in the area of religious education.

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining

> or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" *Everson* v. *Board of Education*, 330 U. S. 1, 15–16 (1947).

Building upon *Everson* Justice Black wrote the Court's opinion invalidating the practice of some schools to release time in the school day so that students could participate voluntarily in religious activities within the school building. *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

> "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. . . ." *Id.*, at 211–212.

Finally, in 1962 Justice Black wrote one of the most controversial opinions rendered by the Court during the quarter-century he had by then been an Associate Justice. In *Engel* v. *Vitale*, 370 U. S. 421 (1962), the Court held

that the Constitution outlawed voluntary repetition of the New York Regents' Prayer in the public schools of that State. The opinion reflects Justice Black's deep respect for Thomas Jefferson's "wall of separation" between church and state and the Justice's own strong religious upbringing.

> "It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that since the beginning of that history many people have devoutly believed that '[m]ore things are wrought by prayer than this world dreams of.' It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that

> government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Id.*, at 433–435.

We believe that it would be fitting to end this remembrance of Justice Black as he ended thirty-four Terms in pursuit of his constitutional faith—with attention to his deep concern for freedom of the press. His opinion supporting the right of several newspapers to publish the *Pentagon Papers* critical of the Viet Nam War was the culmination of his effort over his entire long tenure to keep the press free from government interference.

In *Bridges* v. *California*, 314 U. S. 252 (1941), Justice Black's opinion for the Court upheld the right of an individual citizen vigorously to speak his mind to government officials and the right of a newspaper to editorialize about pending lawsuits. He wrote:

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act

> at the peril that judges might find in the utterance a 'reasonable tendency' to obstruct justice in a pending case." *Id.*, at 269.

And in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 293 (1964), his concurring opinion expressed his opposition to onerous libel judgments that might curb the unfettered flow of news to the great detriment of our free society. His dramatic grand finale, in *New York Times Co.* v. *United States*, 403 U. S. 713 (1971), re-expressed much of the faith he always had in that well worn, dog-eared little paperback booklet entitled "The Constitution of the United States of America" which was seldom out of his reach:

> "The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history. Madison and the other Framers of the First Amendment, able men that they were, wrote in language they earnestly believed could never be misunderstood: 'Congress shall make no law . . . abridging the freedom . . . of the press . . . .' Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.
>
> "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free

> to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. . . ." [22] *Id.*, at 716–717 (concurring opinion).

Now the work of Justice Black is done. His constitutional faith is recorded in over 100 volumes of the United States Reports, the 3,000 Court decisions on which he voted and the nearly 1,000 opinions which he wrote, 53 of them in his last Term.

We must, of course, await the judgment of history for a valid appraisal of his work. We need not wait to acknowledge with gratitude that he was, indeed, one "who tried his dead level best to serve." And there are many already prepared to join in an admiring judgment rendered over ten years ago that:

> "This man is meant for the ages. No future Supreme Court Justice, a hundred years hence or a thousand, will ignore with inner impunity the myriad brilliant insights, learned analyses, yes, and fervent faiths that mark, in majority or dissent, his judicial record. The pity is only that Hugo LaFayette Black in person—he of the warm wisdom and the quiet courage and gentle strength—cannot, as will his opinions, live forever." [23]

Wherefore, *it is resolved* that we, the Bar of the Supreme Court of the United States, express our sorrow

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[22] Those who would doubt that Hugo Black remained a Southerner throughout his life should compare the last sentence quoted above with the ballad, "I Am a Dirty Rebel."

[23] Professor Fred Rodell, quoted in I. Dilliard, One Man's Stand for Freedom 26 (1963).

and deep sense of loss that Justice Black is no longer with us; we are comforted by the knowledge that he lived (and knew that he had lived) a full and useful life in which he served his people and his country with every ounce of the considerable energy, love and devotion which he could muster; we are strengthened by his example of courage, discipline, steadfastness and wisdom; and we are inspired by his enduring faith that our written Constitution, our Bill of Rights and the rule of law are the best instruments yet designed for the preservation and peaceful development of the Nation he knew and loved.

And it is further resolved that the Chairman of our Committee on Resolutions be directed to present these resolutions to the Court with the prayer that they be embodied in its permanent records.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General, your motion will be granted. We will now hear from the Acting Attorney General of the United States.

Mr. Acting Attorney General Kleindienst addressed the Court as follows:

Mr. Chief Justice, may it please the Court:

The Bar of this Court met today to honor the memory of Hugo L. Black, Associate Justice of the Supreme Court for 34 years, from 1937 to 1971. Without doubt, he was and will remain one of the most revered Justices this country has ever known and we can say with assurance that when the history of the twentieth century is written three decades hence, Hugo Black will take his place among the towering judicial figures of these eventful times. In recalling Justice Black we are reminded of the words of Judge Learned Hand in his tribute to Cardozo: "He is gone, and while the west is still lighted with his

radiance, it is well for us to pause and take count of our own coarser selves."

The hills of Alabama caught the first gleam of the morning in 1886 and even three-quarters of a century later Justice Black would still describe himself, with characteristic modesty, as a "rather backward country fellow." The story of his journey from Clay County to the Supreme Court of the United States has been often told; it is a journey that cannot be measured in time or distance but in accumulated wisdom and experience. On this occasion we can do no more than note some of the markers along the way: his modest formal education and the start of his legal career at the age of 18 when he entered the University of Alabama Law School; his brief tenure as a judge of a Birmingham criminal court with petty jurisdiction and his later term spent as a prosecuting attorney—experience that provided lasting lessons in the operation of criminal procedures and vivid memories of the plight of the poor and disadvantaged; his general practice of law after service in the Army during World War I and his effectiveness in pleading his clients' cases before the jury; his ten-year career in the Senate, where he played an important role in the passage of such New Deal measures as the TVA, the Public Utility Holding Company Act of 1935 and the Fair Labor Standards Act of 1938; and his diligent self-education resulting in a knowledge both wide and deep.

All this and much more would have to be taken into account before any portrayal of the background of the man would even approach completeness. This we must leave to those who can speak more intimately. But no matter how brief and inadequate our mention of his early years, we cannot leave out one essential ingredient that is infused in everything he did. For in William James' phrase, Hugo Black "energized at his maximum"—constantly. Once set in motion, he would not rest until he finished the job at hand. And whatever the task, whether clearing the docket of the Birmingham criminal court,

or playing tennis on a Sunday afternoon, or struggling with an important and difficult case before the Supreme Court, he devoted all the strength and zeal he could summon—and that was considerable.

Add to this his great courage—the most important of all virtues because, as Dr. Johnson reminded, without it a man "has no security for preserving any other"—add to this his great courage to hold true to his beliefs and it is not at all unusual to find Mr. Justice Black reversing, in his first opinion for the Court, no less an eminence than Judge Learned Hand and, what is more, doing so less than three weeks after oral argument in a case that can hardly be described as simple. *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112.

During his first Term, in his opinion for the Court in *Johnson* v. *Zerbst,* 304 U. S. 458, we can also see the beginning of his relentless effort to secure the right to counsel for all defendants in criminal cases, which successfully culminated 25 years later in his famous opinion in *Gideon* v. *Wainwright,* 372 U. S. 335. *Johnson* v. *Zerbst* is noteworthy too for his exhaustive, but succinct definition of waiver as an "intentional relinquishment or abandonment of a known right or privilege," 304 U. S. 464—a pronouncement that to this day has exerted substantial influence.

There are many themes that recur in Justice Black's opinions. His insistence on focusing on what the decision would mean to the individuals affected by it is well known. See, *e. g., Fleming* v. *Nestor,* 363 U. S. 603, 621, 624 (dissenting opinion). He was concerned with setting down firm and concise rules so that people could govern their actions accordingly and, just as important, so that judges would not be set adrift in a sea of uncertainty where, in his words, the "fundamental rights of the people [would] be dependent upon the different emphasis different judges put upon different values at different times." *Konigsberg* v. *State Bar,* 366 U. S. 56, 75 (dissenting opinion). To Justice Black, flexibility was not a desirable attribute

but a positive evil to be avoided in dealing with people's constitutional rights. He wrote, for example, in his dissenting opinion in *Braden* v. *United States*, 365 U. S. 438, 445, that: "The majority's approach makes the First Amendment, not the rigid protection of liberty its language imports, but a poor flexible imitation."

All who knew him or who have read his opinions are aware of his penetrating intelligence and of his ability to reason logically and with force. But Justice Black believed, as he stated only a few years after he began his career on the bench, that "Constitutional interpretation should involve more than dialectics. The great principles of liberty written in the Bill of Rights cannot safely be treated as imprisoned in the walls of formal logic . . . ." *Feldman* v. *United States*, 322 U. S. 487, 499 (dissenting opinion). He knew well Dean Pound's admonition that "logic does not give starting points" and, whether the Bill of Rights or federal legislation was involved, Justice Black adhered to the view that starting points were not to be devised by judges. Instead they were to be gleaned from the Founders or the legislature, in light of the language used and its historical background. As he wrote in describing his constitutional faith, "it is language and history that are the crucial factors which influence me in interpreting the Constitution—not reasonableness or desirability as determined by Justices of the Supreme Court."

When he had decided what the Framers meant he maintained that position with consistency and integrity. Throughout his succeeding years on the Court, for example, he never departed from the view, first expounded in *Adamson* v. *California*, 332 U. S. 46, 68 (dissenting opinion), that the Fourteenth Amendment made the Bill of Rights fully applicable to the states—a view he arrived at through the study of history and one buttressed by the fact that other theories such as "selective incorporation" left judges free to determine what rights were "fundamental."

This is not to say, however, that for him the great constitutional guarantees were confined within static bounds. Repeatedly, his opinions marked a path for applying the substance of those guarantees to new factual circumstances that could not have been known to their Framers. An example is his opinion for the Court in *United States* v. *Lovett*, 328 U. S. 303, which breathed new vitality into the prohibition of bills of attainder.

Perhaps he is best known for his position that the First Amendment is an "absolute"—that when the Framers said: "Congress shall make no law . . . abridging the freedom of speech" they meant "no law." It was in cases involving freedom of speech that he made his most impassioned arguments, for he was unashamed of human emotions and unhesitant about revealing his own in defense of liberty. Often in dissent he would chide the majority for employing what he described as the "so-called balancing test." To Justice Black, the Framers had done all the balancing when they wrote the First Amendment. And even when his pleas failed to persuade, particularly during the turbulent period of the early fifties, one can still feel in his dissents the breezes of humanity blowing in to purify the atmosphere and set the tone for decision in calmer times. Compare *Dennis* v. *United States*, 341 U. S. 579, 581 (dissenting opinion), with *Yates* v. *United States*, 354 U. S. 298.

There were qualities about Justice Black that invited further inquiry by those who did not know him but knew only of him, apparent paradoxes that vanished as the image of the man sharpened. He had great warmth and kindliness, but his opinions and his memorable oral announcements of them in the courtroom resounded with eloquent indignation whenever a wrong needed righting. He would rigorously attack the ideas of those with whom he disagreed, but he bore no personal malice and never spoke ill of anyone. The structure of his writings is studied simplicity, but for those astute enough to delve beyond, the vast foundation of the views he expressed is

revealed. To him the law was serious business, yet his sparkle and mirth often defused the charged atmosphere of oral argument. While he strove for firm and fixed legal rules, he would overrule precedent and uproot established practice without hesitation in order to fulfill his primary duty to the Constitution. He was both talkative and a good listener; intense, but relaxed; and, most of all, gentle in manner but firm in holding to his beliefs during the ebbs and flows of public opinion that marked his 34 years on the bench.

It is perhaps inevitable that the future will see comparisons made and similarities noted between Justice Black and John Marshall or Holmes or Brandeis or Cardozo. The attempt is worthy and intellectually fascinating, but in the end it must fail. For Hugo Black was, above all else, his own man. There have been few judges whose writing had so many ideas brooding in the background. He has left his legacy in more than one hundred volumes of United States Reports and so long as men seek to be true to themselves his light will remain to guide the way.

May it please this Honorable Court: In the name of the lawyers of this Nation, and particularly of the Bar of this Court, I respectfully request that the resolution presented to you in memory of the late Justice Hugo L. Black be accepted by you, and that it, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Thank you, Mr. Acting Attorney General, for the tribute of the Bar of the Supreme Court to our late Brother, Hugo Black. Your motion will be granted.

If it is possible to add anything to the splendid tributes to Hugo Black, in making the traditional response to your presentation, it seems to me I can do this best by some observations, not primarily on his stature as a judge, but

rather to touch briefly on dimensions of the man as seen by us and in terms of his personal qualities of a human being.

We, who knew Hugo Black well, even though in varying degrees as to the length of our association, can and do agree heartily with all that you and the others have said. The intimacy of the daily association of Justices of the Court is such that, within the Court, each of us acquires an insight and appreciation concerning a colleague that may not be paralleled in any other kind of association.

Even in the intimacy of a law firm each partner does much of his work alone. In this Court we can only act together, even when we do not agree. To do our task, we must consult on each step and stage, and almost daily, as the decisions evolve.

You gentlemen of the Bar have depicted Hugo Black as he appeared to you, chiefly as advocates see a Justice on the bench, through his opinions, and perhaps through an occasional speech. A law clerk has perhaps a more intimate view but, at best, that is only a glimpse.

The tributes you have presented, along with countless other tributes to Hugo Black over the past 20 years—and with more to come—will become part of the fabric of the large record of this uncommon man and part of the literature of the law to which his life was devoted as an advocate, as a legislator and as a judge.

There is always a risk of having our admiration for uncommon men and women create an image that becomes, in time, more legend than flesh and blood. Hugo Black would not like that. He was surely an unusual man, but he was very human. He valued respect, he cherished friendship, but he would not care for sentimental adulation.

He would not mind a dash of legend but he was so vital in his humanity, so firm in his basic views, that he would also want to be seen and remembered as his intimates saw him; what we saw was a warm, responsive, responsible

person and a passionate advocate of his own deepfelt convictions.

He made no apologies for having been a politician, which he had been in the high sense of that word. Nor did he make apologies for being an advocate and he surely was that. Indeed we who shared the intimacy of the Conference with him well know his powers of advocacy, for even when they did not persuade, they shook the positions of others.

But even at his most ardent and passionate, he was always ready to listen and on occasion to change his mind. His was a reasoning mind. Perhaps one of his favorite words was "reasonable." I believe he ranked "reasonable" with "fair" and "just." The combination of those concepts—reasonable, fair, just—made him a tolerant man who would always listen to others. I can see him now when someone sought to make a point with him: leaning back in his chair at the bench or in Conference, or in his chambers—head cocked, fingertips touching, his attention focused. Even with his passionate belief in the First Amendment that earned him, with some, the term "absolutist," he was careful to distinguish conduct from speech, occasionally to the dismay of the true absolutists.

Justice Douglas served with Hugo Black for more than 30 years and he recalls the toughness and vigor and alertness of Hugo Black's mind that was matched by his physical alertness. This made him love the game of tennis that he played until very recent times. Justice Douglas describes Hugo Black as a fierce competitor, whether in his days in the courtrooms in Alabama, or on the Senate floor, or in the Conferences of the Court; he saw no diminution of the depth of his convictions and the skill and vigor of his advocacy over the years they sat on the Court together. He describes Hugo Black as "a tartar" and a man whose fervor led him to contend for supporters of his point of view. This fierceness and fervor as an advocate who could declaim, and even thunder,

for his position had another side that could be seen by his colleagues almost as well in one year as in many years of association.

This was the man of the warm smile, the soft Southern voice, the gentle manner. Over their long years together, Justice Douglas saw him as a man whose friends could do almost no wrong, or if they did, he would defend them or explain them in an effort of mitigation. In short, he describes Hugo Black as a man who was no "fair weather friend" but a friend for all seasons. This quality made him a friend to cherish, to consult, to spend happy hours of comradeship with, with talk of campaigns fought long ago, cases tried a half century past in Alabama, anecdotes of the great figures of the stirring years he spent in the Senate and of his early years on the Court.

Whatever the battles of the past, or struggles over issues within the Court, Hugo Black carried no bitterness or scars. If any tension arose, as it could in the heat of debate with a passionate advocate, it washed away quickly. As with all of us, he preferred to have others agree with him, but he did more than tolerate disagreement, he welcomed and respected it and listened to it.

On one occasion, Hugo Black and I talked for several hours on a point that could move him to great eloquence. He could see that I was not fully persuaded, and, as we separated, that wonderful, warm smile flooded his countenance, his eyes sparkled and he said something like this:

> "Do you know something? You might be right about that, so stick to your guns. I don't think you are right, but it might turn out that you are."

This was not a pose, or a gesture. It came directly from the well-springs of his nature. It was an Alabama populist's 20th century version of Voltaire's famous dictum. He was a confident man, sure of his own powers and convictions, but there was a quality of humility that could be seen in a very short time after coming under his spell. He would listen as attentively to the newest Justice as to the most senior.

I found it interesting that Justice Brennan in 16 years independently identified the same qualities that Justice Douglas observed in Hugo Black in his association of more than three decades, and they were the same qualities that others of us could observe in the short span of a few years.

Justice Brennan recalls one occasion when Hugo Black was quietly but firmly insistent on having certain changes made in one of Justice Brennan's opinions, during the difficult May and June period when tension and pressure are great and patience is in short supply. Justice Brennan recalled that finally he spoke rather sharply and pointedly over the phone to Justice Black generally about the matter of finality at some point in the process of writing an opinion. Soon after what Justice Brennan described to me as his vigorous outburst, Justice Black walked into his office and told him to leave the building—to stay away, saying: "This place can become like a pressure cooker and it can beat the strongest of men. You should get out of here and forget it for a few days." Justice Brennan said he accepted the advice.

On another occasion, Hugo Black and Justice Brennan were in disagreement in a First Amendment case and a vigorous exchange occurred over many weeks. When it was over, Justice Black wrote, saying:

> "Much as I disagree with you, I admire the way you fought for your position."

Of the present court, Justice Blackmun is the most recent member to serve with Hugo Black, serving one year with him. He recalls Justice Black coming to his chambers one day to discuss a dissent in which he was joining Justice Blackmun. His comment was:

> "That's the way to do it, Harry—strike for the jugular, strike for the jugular."

Striking the jugular, as we know, does not necessarily cause much pain, but it can be fatal. This was Hugo Black, the advocate, speaking; for a dissenter is, by defini-

tion, an advocate. His dissents were always powerful, they always struck the jugular, and they were often prophetic.

I hope I can be indulged some observations on the intimate relationship I had with Hugo Black from the time I came here three years ago.

I had known him slightly after I came to Washington in 1953 and from arguing cases before the Court. When I went on the Court of Appeals in 1956, one of his former law clerks with whom I had worked in the Department of Justice arranged for the three of us to have lunch together. After that I saw him intermittently and a cordial but not close relationship developed.

Sometimes when I would see him at Washington parties, he would say, naming a particular case,

> "I read your dissent. You may be right about that, but even if you're not, stand by it. Dissents keep the boys on their toes."

But when I came to this Court 3 years ago, he was at once both warmly cordial and helpful in his welcome. During that first summer I remained in Washington, as he did, and saw him almost daily. As the senior Justice, he was the logical member of the Court for me to consult as I tried to adapt my experience on the Court of Appeals to the work of this Court. We lunched together often and I found myself not only consulting him on the steady stream of chambers motions, but on a wide range of internal matters of the Court's work.

As time went on during the 1969 Term, he occasionally dropped in to see me, sometimes as he was leaving for the day. He would vary between cautioning and scolding me about taking on too much of the administrative burdens of the federal judiciary while carrying on a full load of Court work. Once he said:

> "Chief, you've got to let up. Make them get someone else to do that. Congress has no right to give nonjudicial duties to a Justice of this Court."

Yet on many sensitive and difficult problems of the federal systems, his counsel was most valuable to me. He would remind me that Chief Justice Hughes had said: "This job can kill a man if he is not careful."

As a Senator when Hughes was named to be Chief Justice, Hugo Black opposed the nomination, spoke against him, and voted against him in a bitter and long-drawn-out confirmation battle. A few years later, he was himself named to the Court in an atmosphere that engendered controversy at the time. When he came to the Court, Chief Justice Hughes greeted Black cordially and was helpful in every way and never alluded to Black's opposition and vote against him.

It was characteristic of Hugo Black to say, as he did on several occasions:

> "When Hughes was nominated I thought of him as a big business Wall Street lawyer, not much interested in the people. I was a Senator from a rural state and it was the poor people and small farmers who sent me here and he didn't seem like our kind of man.
>
> "But I was wrong. Hughes was a fine human being and a fine justice, and a great Chief Justice, and we became warm friends."

We know how Hugo Black loved good stories, a happy evening with lawyers and judges. His table, which he and Elizabeth presided over in my time, was a gourmet's delight. I often teased him about his lack of interest in wine, since the only wine he cared for was made from scuppernong grapes that abound in the South. When I discovered this I kept a supply of it on hand for him. He, in turn, would both tease and caution some of the rest of us, quoting Chief Justice Hughes' dictum that judicial work on the Supreme Court never killed any Justime, but overeating did. When we changed the lunch hour from 30 to 60 minutes, he said he would "go along" but he feared we would all eat too much.

One fairly recent incident discloses a side of Hugo Black that the public could not see.

When we contemplated changing the shape of this bench to make it easier for lawyers to hear the Justices, and especially for Justices on the two end seats to hear each other, we arranged to have a full-scale model of the proposed bench made up in plywood on the same elevation as we now sit. This model was placed in the East Conference Room with a lectern in front and our chairs in place. Then one day we all gathered to make the final decision. As we sat at our places and discussed the change, Justice Harlan, with the professional advocate's point of view, said he wanted to see how the bench would look to the lawyer. He went to the lectern and engaged in a colloquy with those of us on the bench. Finally, he said he believed it would be an improvement, but then he added:

> "There is just one thing I don't like about this."

We all waited, but we could begin to see a twinkle in the Harlan eyes. Someone said, "What is it, John?" "The trouble I see," said Justice Harlan, "is that the change in shape gives an inordinate prominence and position to the three Justices in the center section."

Hugo Black responded immediately, and the smile on his face carried out the byplay:

> "John, you're wrong—very wrong—it just *seems* that way to *you* because of the *distinction* and quality of the three men who sit here."

One of the most pleasant memories I have of our informal hours were those last spring when, on occasion, the Justices had lunch beside the fountain in one of the courtyards. Since he loved his garden at home, he seemed to respond to the courtyard setting, and more than the usual number of stories came forth.

I never heard him speak ill of any man in any mean-spirited sense. Occasionally, when the news media would

have stories about Justices or the opinions of the Court that would bring annoyed comments from Justices, he would say:

> "Don't let it bother you. This has been going on a long time. Those fellows must have something to write about and when there isn't anything, they have to think something up. Just forget about it."

At the risk of repetition, I would like to close by drawing on what I stated on the opening day of the 1971 Term when we had the sad duty of announcing that the Court opened without Hugo Black for the first time in 34 years—a tenure that spanned that of one-third of all the Chief Justices who presided here since the first session on February 1, 1790.

In time, I believe, one thing will stand out above all else in Hugo Black's work and his thinking. Throughout his entire career, he never wavered in his unbounded faith in the people and in the democratic political processes of a free people under the American Constitution. He loved this Court as an institution, he revered the Constitution, he had enormous respect for the Presidency and high regard for the Congress, but above all else, he believed in the people. He had no doubt whatever as to the ability of an informed and free people to determine their own destinies.

We will miss his wisdom, his comradeship, and the radiant warmth of his rare spirit, but to use his own words, "the Court will go on."

Mr. Attorney General, Mr. Solicitor General, on behalf of the Court, I thank you for your presentation in memory of our late Brother Hugo L. Black. We accept the resolutions of the bar and we ask that you convey to Mr. Louis Oberdorfer, chairman of the bar committee, and all its members, our appreciation for their statements, which will be made part of the records of this Court in perpetuity.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1971

BOYD *v.* DUTTON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70–5075. Decided February 22, 1972

Where the material facts bearing upon the issue of whether petitioner, charged with four felonies, knowingly and voluntarily waived his constitutional right to counsel before entering a guilty plea in the state trial court, were inadequately developed in a state court post-conviction hearing, the Federal District Court considering a habeas corpus petition was under a duty to hold an evidentiary hearing. *Townsend* v. *Sain*, 372 U. S. 293, 313; 28 U. S. C. § 2254 (d).

Certiorari granted; 435 F. 2d 153, vacated and remanded to District Court.

PER CURIAM.

The petitioner, Jack Boyd, pleaded guilty in a Georgia trial court to three counts of forging checks and to one count of possession of a forged check. He was not represented by a lawyer. The court sentenced him to serve 28 years in prison—four consecutive terms of seven years each. No transcript of that plea or sentencing proceeding exists.

He sought habeas corpus relief in the state trial court, alleging, among other things, that he had been denied the assistance of counsel. An evidentiary hearing was

held, and relief was denied. An appeal was dismissed by the Georgia Supreme Court. The petitioner then filed a petition for habeas corpus in a Federal District Court, which denied relief without a hearing, basing its decision on the record of the state post-conviction proceeding. The Court of Appeals for the Fifth Circuit affirmed, *Boyd* v. *Smith*, 435 F. 2d 153.

At the Georgia post-conviction hearing, where the petitioner was also without the assistance of counsel, the only witness for the State on the question of waiver of counsel at the arraignment was a man named Dunnaway, who had been present at the arraignment, as Deputy Sheriff of Terrell County, Georgia. According to Dunnaway, the prosecutor told the petitioner that he was entitled to legal counsel and that the court would appoint a lawyer if the petitioner could not afford one. By Dunnaway's account, the prosecutor then asked the petitioner if he wanted a lawyer, and the petitioner replied that he did not. Yet there were apparently no questions from either the judge or the prosecutor during the arraignment inquiring whether the petitioner understood the nature and consequences of his alleged waiver of the right to counsel or of his guilty plea.

The petitioner expressed a desire to call witnesses at the state post-conviction hearing, but the court did not ask him who the proposed witnesses were or inquire about the expected nature of their testimony. The judge simply noted that the petitioner, who obviously possessed no legal skills, had failed to subpoena those whom he wanted to testify.

A person charged with a felony in a state court has an unconditional and absolute constitutional right to a lawyer. *Gideon* v. *Wainwright*, 372 U. S. 335. This right attaches at the pleading stage of the criminal process, *Rice* v. *Olson*, 324 U. S. 786, and may be waived

only by voluntary and knowing action, *Johnson* v. *Zerbst*, 304 U. S. 458; *Carnley* v. *Cochran*, 369 U. S. 506. Waiver will not be "lightly presumed," and a trial judge must "indulge every reasonable presumption against waiver." *Johnson, supra*, at 464.

The controlling issue in this case is whether the petitioner knowingly and voluntarily waived his constitutional right to counsel before entering the guilty plea in the state trial court. It is evident that the material facts bearing upon that issue were inadequately developed in the state court post-conviction hearing. That being so, the Federal District Court was under a duty to hold an evidentiary hearing. *Townsend* v. *Sain*, 372 U. S. 293, 313; 28 U. S. C. § 2254 (d). Accordingly, we grant the petition for a writ of certiorari, vacate the judgment before us, and remand the case to the District Court for an evidentiary hearing.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's *per curiam* opinion and judgment. I do so, however, only after some initial hesitation, for there is force in MR. JUSTICE POWELL'S dissent when it stresses that the unanimous judgment of four courts is being overturned and that the trier of fact in the state post-conviction procedure decided the factual issues against the petitioner.

A reading of the post-conviction transcript, however, persuades me that the petitioner was utterly lost at that proceeding; that his assertion that favorable witnesses existed was frustrated because he did not know how to compel their attendance and received no assistance in this respect; and that the development of the material facts leaves something to be desired and falls somewhat short of the standards laid down in *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963). When a 20-year-old who

claims he could not read or write (although he apparently was able to sign his name to the petition in the present proceeding) receives four consecutive seven-year sentences, totaling 28 years, for forging three checks within a fortnight in the respective amounts of $45, $45, and $40, and for possessing a forged check in the amount of $10, his post-conviction hearing, for me and on balance, must clearly meet those standards. Certainly, the appointment of counsel is indicated.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

There is no suggestion that either the trial court accepting petitioner's plea of guilty or the state court denying habeas corpus employed an erroneous legal standard in proceeding as it did. On this record we may "properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied." *Townsend* v. *Sain*, 372 U. S. 293, 315 (1963). And in participating in our appellate function and acting on the cold record before us, I cannot presume greater insight into petitioner's understanding of his rights, his waiver of counsel, and his plea of guilty than that of the other courts that have considered this case, including the state court accepting the plea of guilty and the habeas corpus court that heard petitioner and the other evidence. According to the undisputed evidence as to the circumstances surrounding the plea, petitioner stated that he waived counsel, admitted that he was guilty, and accordingly entered his plea. Like MR. JUSTICE POWELL, I think the judgment of the state court was fairly supported by the evidence. The petition for writ of certiorari having been granted, I would affirm the judgment of the Court of Appeals.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

The *per curiam* opinion of the Court finds that the facts in this case were "inadequately developed" with respect to the controlling issue whether petitioner knowingly and voluntarily waived his constitutional right to counsel before entering the guilty plea in the state trial court. Relying on *Townsend* v. *Sain*, 372 U. S. 293 (1963), the majority remands the case to the District Court.

As it seems to me that the facts on this issue were adequately developed in the state post-conviction evidentiary hearing, I dissent from the majority holding. At that hearing Deputy Sheriff Dunnaway, who was present at the time petitioner waived counsel, testified as follows:

> "Q. What prompted you to get him out of jail? Had he indicated he wanted to enter a plea or what?
>
> "A. He stated he wanted to go before the Judge and enter a plea of guilty.
>
> "Q. And is Saturday the regular day that the Judge takes pleas there?
>
> "A. Yes, sir. He takes 'em in Colquitt, his home town.
>
> "Q. And you took him yourself to the Courtroom from the jail?
>
> "A. Yes, sir.
>
> "Q. Would you tell the Court briefly what happened whenever you got him to the Courtroom?
>
> "A. He was carried to the Courtroom, and, uh, the Solicitor drawed up the accusations against him, and after he drawed up the accusation against him, and I signed the accusation, we called Jack Boyd and Clinton Henderson, another boy that was with him, into the Courtroom, and Mr. Ray advised each

of 'em what the charges against 'em was and asked 'em did they have legal counsel, and which both of 'em stated they did not have legal counsel. Mr. Ray advised both of 'em that they were entitled to legal counsel, and if they could not afford it, the Court would appoint 'em legal counsel, and asked . . . also, he advised 'em if they wanted to go to trial by jury, that the Court would appoint 'em an attorney to represent 'em in trial, and this defendant and Clinton Henderson both stated to Mr. Ray, in my presence, that they both knew they was guilty and they didn't want a trial, and they both signed the accusation that they was guilty, and I witnessed the signature of both of 'em.

"Q. I believe you said you had known Jack Boyd for a good many years. Did he appear to understand from his demeanor what was going on and what he was charged with?

"A. Yes, sir.

"Q. Is he possessed of average intelligence at least?

"A. Yes, sir.

"Q. Did he appear to understand Mr. Ray when he told him that he had the right to have an attorney?

"A. Mr. Ray asked him did he understand what he had stated to him. He said that he did.

"Q. In your opinion, from your familiarity with him, your acquaintance with him, and from your observation of him at that time, did he knowingly and intelligently enter his plea of guilty?

"A. Yes, sir.

"Q. Did he knowingly and intelligently . . . this is your opinion also I'm asking about, waive his right to any counsel, legal counsel?

"A. Yes, sir."

Petitioner was present when Dunnaway testified and did not contradict the foregoing testimony that he waived counsel. This undisputed testimony seems adequate, as the courts below found, to warrant the conclusions that petitioner knowingly and voluntarily waived his right to counsel, and that no further evidentiary hearing was required.

It is true that petitioner is uneducated, and that the sentence imposed seems disproportionate to the crime.[1] It is also true that the state court hearing could have been more exhaustive.[2] Additional witnesses might have been called, as suggested by the majority opinion, although there is no indication in the record that they would have contradicted the testimony with respect to waiving counsel which petitioner himself failed to dispute. But the ultimate test with respect to the holding of an evidentiary hearing by a federal district court is whether there was "a full and fair fact hearing" in the state proceedings. *Townsend, supra,* at 313. Where the material facts bearing upon the relatively narrow issue of waiving counsel are undisputed, except inferentially, and show that waiver was made "knowingly and intelligently," I believe that this test has been met.[3]

There is little likelihood that a new hearing now, eight years after the 1964 conviction, will be conducive to de-

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[1] Petitioner, having served some eight years, may well merit consideration for parole or executive clemency.

[2] The trial judge would have been well advised to have appointed a lawyer, although that is not constitutionally required. See *Johnson* v. *Avery,* 393 U. S. 483, 488 (1969) (dictum); Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1197 (1970).

[3] In *Townsend* v. *Sain,* 372 U. S. 293, 319 (1963), the Court recognized that it must rely largely on district judges, who have the "paramount responsibility in this area," to implement the prescribed standards.

pendable factfinding [4] or will enlarge upon the evidence already considered. This case already has received the attention of four courts. Remanding it may further the repetitive judicial re-examination which has become so commonplace. The current flood of petitions for post-conviction relief already threatens—because of sheer volume—to submerge meritorious claims and even to produce a judicial insensitivity to habeas corpus petitioners.[5]

[4] Petitioner demonstrated in the state court proceeding the infirmity of his memory by initially denying that he had ever been in court prior to the forgery charge, when in fact he had been convicted previously of receiving stolen goods and had served a sentence for that crime.

[5] See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 451 (1963).

COLOMBO *v.* NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 71–352. Decided February 22, 1972

Petitioner refused to answer a grand jury's questions despite a grant of immunity. A trial judge found the questions to be proper and directed petitioner to answer. Petitioner refused, and the judge found that by "his contumacious and unlawful refusal . . . to answer any legal and proper interrogatories and for his wilful disobedience to the lawful mandate of this Court" petitioner had "committed a criminal contempt of court" in violation of N. Y. Judiciary Law § 750. He was sentenced to 30 days and fined $250. His offer to testify thereafter was refused and he paid his fine and served his sentence. Petitioner was then indicted under N. Y. Penal Law § 600 "for his contumacious and unlawful refusal . . . to answer legal and proper interrogatories." The trial court dismissed the indictment on double jeopardy grounds, but the appellate court reversed. The New York Court of Appeals, sustaining the reversal, held that there were two acts of contempt, one before the grand jury, and the other the refusal to obey the court order, and that the trial judge had committed petitioner for civil, not criminal, contempt. *Held:* Petitioner was penalized for criminal contempt for purposes of the Double Jeopardy Clause, and in view of the state court's misconception of the nature of the contempt judgment, and the substantial question of state law arising from the State's response that it considers the two acts of contempt as being partially intertwined, the judgment is vacated and the case is remanded to the state court.

Certiorari granted; 29 N. Y. 2d 1, 271 N. E. 2d 694, vacated and remanded.

PER CURIAM.

Despite a grant of immunity in response to the assertion of his Fifth Amendment privilege not to be a witness against himself, petitioner refused to answer questions put to him before a Kings County, New York, grand jury. On December 7, 1965, a trial judge found that

the questions put had been proper and directed petitioner to answer them. Petitioner refused; the trial court, after allowing petitioner a week's time to change his mind, signed a commitment order stating that by "his contumacious and unlawful refusal after being sworn as a witness to answer any legal and proper interrogatories and for his wilful disobedience to the lawful mandate of this Court" petitioner had "committed a criminal contempt of court in the immediate view and presence of the Court and that said contempt was wilful and unlawful and in violation of Section 750 of the Judiciary Law of the State of New York . . . ." Petitioner was sentenced to 30 days and fined $250.

Appellate proceedings proved fruitless. Petitioner then offered to testify, the offer was refused, and petitioner paid his fine and served his sentence. On October 10, 1966, petitioner was indicted under § 600, subd. 6, of the New York Penal Law of 1909 "for his contumacious and unlawful refusal, after being duly sworn as a witness, to answer legal and proper interrogatories." The trial court dismissed the indictment on double jeopardy grounds but the appellate court reversed. The reversal was sustained by the Court of Appeals, which concluded that the Fourteenth Amendment and the double jeopardy provision of the Fifth Amendment did not bar the indictment. The court reasoned that petitioner had committed two acts of contempt—one on October 14, 1965, before the grand jury, and the other on December 7 when he refused to obey the order of the judge—and that the trial judge had committed petitioner for civil, not criminal, contempt.

The judgment of the Court of Appeals must be vacated. The judgment of the New York trial court entered on December 15, 1965, was for "criminal contempt," petitioner was sentenced to a definite term in jail and ordered to pay a fine, and neither the prosecutor nor the trial court

considered his offer to testify as sufficient to foreclose execution of the sentence. For purposes of the Double Jeopardy Clause, petitioner was confined and penalized for criminal contempt. *Yates* v. *United States*, 355 U. S. 66 (1957); see also *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966); *Shillitani* v. *United States*, 384 U. S. 364 (1966); *Oriel* v. *Russell*, 278 U. S. 358 (1929). To the extent that the judgment of the Court of Appeals rested on a contrary view, it must be set aside. It also appears from its supplemental response that the State considers the two acts of contempt on October 14 and on December 7 as being partially intertwined. As we understand it from the State's response, petitioner's refusal to answer on October 14 did not mature into a complete contempt until December 7 when the trial court passed on the propriety of the grand jury's inquiry and petitioner thereafter refused to obey the court's direction to return to the grand jury and answer the questions properly put to him.

In view of the New York Court of Appeals' misconception of the nature of the contempt judgment entered against petitioner for purposes of the Double Jeopardy Clause and in view of the substantial question of New York law that has emerged, we are disinclined at this juncture to entertain and determine the double jeopardy question presented by petitioner. The better course is to grant the petition for writ of certiorari, vacate the judgment of the New York Court of Appeals, and remand the case to that court for further proceedings not inconsistent with this opinion, thus affording that court the opportunity to reconsider the validity of the indictment under the Double Jeopardy Clause of the Constitution.

So ordered.

MR. JUSTICE DOUGLAS, dissenting.

On October 14, 1965, petitioner refused to testify when called before a Kings County, New York, grand jury. When, on December 15, after a grant of immunity

and a judicial inquiry into the validity of the grand jury investigation under state law, the petitioner persisted in his refusal to testify, the presiding judge cited him for contempt and imposed a sentence of 30 days and a fine of $250.[1] Despite petitioner's later willingness to testify, the sentence was executed.

The grand jury then returned an indictment against petitioner charging him with criminal contempt for his refusal to testify.[2] Petitioner successfully moved to quash the indictment, but on appeal it was reinstated and upheld against petitioner's contention that it put him twice in jeopardy for the same offense in violation of the Fifth Amendment. *People* v. *Colombo*, 25 N. Y. 2d 641, 254 N. E. 2d 340. We granted the petition for certiorari, vacated the judgment of the New York Court of Appeals, and remanded for consideration in light of *Waller* v. *Florida*, 397 U. S. 387. 400 U. S. 16. On remand, however, the Court of Appeals adhered to its earlier decision, reasoning that the first citation was for civil contempt while the indictment charged a criminal offense and that "two distinct acts [were] being punished—refusal to testify before the Grand Jury and a separate refusal to obey the lawful mandate of a Supreme Court Justice." 29 N. Y. 2d 1, 3, 271 N. E. 2d 694, 695.

The Court of Appeals' characterization of the December 15 citation as "civil" rather than criminal is not dispositive of the question before us. To be sure, federal courts normally are bound by state court interpretations of state law, but involved here is a question of federal right under the Double Jeopardy Clause. In such cases, federal rather than state law governs. Suffice it to say that a 30-day sentence and a $250 fine imposed for refusal

[1] This contempt citation rested upon § 750 of the New York Judiciary Law.

[2] The present indictment is founded upon the former § 600 of the New York Penal Law.

to testify before a grand jury constitutes criminal punishment within the meaning of the double jeopardy provision of the Bill of Rights, at least where the witness' willingness to purge himself of contempt by testifying does not result in the vacation of the sentence. *Shillitani* v. *United States*, 384 U. S. 364, relied upon by respondent, is not to the contrary. There, we held "that the conditional nature of [the] sentences [allowing the contemnors to purge themselves by agreeing to testify] render[ed] each of the actions a civil contempt proceeding . . . ." *Id.*, at 365. In the present case, by contrast, the jail sentence and fine was imposed despite petitioner's willingness to testify.

Nor does the characterization of the two contempts as involving different acts avoid the prohibition against twice being put in jeopardy for the same offense. The 30-day sentence and $250 fine were imposed, *inter alia*, for the petitioner's "refusal after being sworn as a witness to answer any legal and proper interrogatories." This is precisely the offense charged in the present indictment. Respondent lists five elements [3] for the offense of

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[3] Respondent says that "[i]n order to prove the crime of criminal contempt, the following elements must be shown:

"1. That the defendant did unlawfully and contumaciously refuse to answer a legal and proper question before the Grand Jury.

"2. That the quorum of the Grand Jury was present at all times, on any such day when the defendant testified and when the indictment was voted.

"3. That the question which is claimed that the defendant refused to answer was a legal and proper one.

"4. That any such question asked of the defendant, and which, it is charged he refused to answer, was relevant and germane to the investigation being conducted by the Grand Jury.

"5. That the defendant was duly sworn as a witness and contumaciously and unlawfully refused to answer any such legal and proper question." Supplemental Brief 6.

All of these elements—with the exception of the proviso "when the indictment was voted" which relates to the sufficiency of the indictment rather than being a separate element of the offense—were

criminal contempt. All of these elements were necessarily included in the trial court's earlier citation for "civil" contempt. Petitioner need not "run the gantlet" on this offense a second time.[4] *Green* v. *United States*, 355 U. S. 184, 190.

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plainly included in the "civil" contempt. The "witness's contumacious and unlawful refusal to answer questions," *ibid.*, stems from the refusal to obey the trial court's order which also formed the basis for the December 15 citation.

[4] I agree with MR. JUSTICE BRENNAN'S concurring opinion in *Ashe* v. *Swenson*, 397 U. S. 436, 453–454, where he said:

"In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. This 'same transaction' test of 'same offence' not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience." (Footnotes omitted.)

It would be repugnant to these views to allow a separate criminal prosecution and punishment for each day, hour, or minute that a witness refused to testify before a grand jury.

Syllabus

ROUDEBUSH *v.* HARTKE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 70–66. Argued December 13, 1971—Decided February 23, 1972*

Incumbent Senator Hartke was certified by the Indiana Secretary of State to the Governor as the winner of the close 1970 Indiana senatorial election. Candidate Roudebush filed a timely recount petition in state court. The state court denied Hartke's motion to dismiss on the grounds of conflict with the Indiana and Federal Constitutions, and granted the petition for a recount. Hartke sought an injunction against the recount in United States District Court, invoking jurisdiction under 28 U. S. C. § 1343 (3) and claiming that the recount was barred by Art. I, § 5, of the Federal Constitution, delegating to the Senate the power to judge the elections, returns, and qualifications of its members. The three-judge District Court issued the requested injunction. After appeals were filed here, the Senate seated Hartke "without prejudice to the outcome of an appeal pending in the Supreme Court . . . and without prejudice to the outcome of any recount that the Supreme Court might order." Hartke then moved to dismiss the appeals as moot. *Held:*

1. The issue here, whether a recount is a valid exercise of the State's power to prescribe the times, places, and manner of holding elections, pursuant to Art. I, § 4, of the Constitution, or is a forbidden infringement on the Senate's power under Art. I, § 5, is not moot, as the Senate has postponed making a final determination of who is entitled to the office of Senator pending the outcome of this action. Pp. 18–19.

2. The District Court was not barred from issuing an injunction by 28 U. S. C. § 2283, which generally prohibits a federal court from enjoining state court proceedings. Pp. 20–23.

(a) That section does not restrict a federal court from enjoining a state court acting in a nonjudicial capacity. P. 21.

(b) The state court's recount functions are nonjudicial, as they consist merely of determining that the recount petition is correct as to form and appointing recount commissioners. Pp. 21–22.

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*Together with No. 70–67, *Sendak, Attorney General of Indiana* v. *Hartke et al.*, also on appeal from the same court.

(c) The complaint did not seek to enjoin the action of the state court but rather to enjoin the recount commission from proceeding after the court had appointed members of the commission. P. 22.

3. Article I, § 5, does not prohibit a recount of the ballots by Indiana, as the recount will not prevent an independent Senate evaluation of the election any more than the original count did, and it would be mere speculation to assume that Indiana's procedure would impair the Senate's ability to make an independent final judgment. Pp. 23–26.

321 F. Supp. 1370, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, in which BRENNAN, J., joined, *post*, p. 26. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the cases.

Donald A. Schabel argued the cause for appellant in No. 70–66. With him on the briefs was *L. Keith Bulen*. *Richard C. Johnson*, Chief Deputy Attorney General of Indiana, argued the cause for appellant in No. 70–67. On the briefs were *Theodore L. Sendak*, Attorney General, *pro se*, *William F. Thompson*, Assistant Attorney General, and *Mark Peden*, Deputy Attorney General.

John J. Dillon argued the cause for appellees in both cases. With him on the brief for appellee Hartke were *David W. Mernitz* and *James L. Tuohy*.

MR. JUSTICE STEWART delivered the opinion of the Court.

The 1970 election for the office of United States Senator was the closest in Indiana history. The incumbent, Senator R. Vance Hartke (Hartke), was declared the winner by a plurality of 4,383 votes—a margin of approximately one vote per state precinct. On November 16, 1970, 13 days after the election, the Indiana Secretary of State certified to the Governor that Hartke

had been re-elected. On the following day, candidate Richard L. Roudebush (Roudebush) filed in the Superior Court of Marion County a timely petition for a recount.[1] Hartke moved in that court to dismiss the petition, arguing that the state recount procedure conflicted with the Indiana and Federal Constitutions. On December 1, the state court denied the motion to dismiss and granted the petition for a recount. It appointed a three-man recount commission and directed it to begin its task on December 8.

Hartke then filed a complaint in the United States District Court for the Southern District of Indiana asking for an injunction against the recount. He invoked federal jurisdiction under 28 U. S. C. § 1343 (3) [2] and claimed that the recount was prohibited by Art. I, § 5, of the Constitution of the United States, which delegates to the Senate the power to judge the elections, returns, and qualifications of its members.[3] A single district

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[1] Roudebush filed similar petitions in 10 other counties. Recounts in all 11 counties have been postponed, pending the outcome of this cause.

[2] Title 28 U. S. C. § 1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

The District Court apparently viewed the suit as substantively based upon 42 U. S. C. § 1983, which authorizes a civil action on the part of a person deprived, under color of state law, "of any rights, privileges, or immunities secured by the Constitution . . . ."

[3] U. S. Const., Art. I, § 5, provides in pertinent part:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."

judge issued an order temporarily restraining the recount pending decision by a three-judge district court. The Attorney General of Indiana then moved successfully to intervene as a defendant, and a three-judge court was convened pursuant to 28 U. S. C. § 2284. After taking testimony and hearing argument, the court ruled in Hartke's favor and issued an interlocutory injunction, 321 F. Supp. 1370, one judge dissenting. Roudebush and the Attorney General both brought direct appeals to this Court.[4]

On January 21, 1971, shortly after the jurisdictional statements were filed, the Senate administered the oath of office to Hartke, who had been issued a certificate of election by the Governor. Hartke was seated, however, "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order . . . ." [5] Following the Senate's decision to seat him, Hartke moved to dismiss the appeals as moot. We consolidated both appeals and postponed further consideration of questions of jurisdiction to the hearing of the cause on the merits. 401 U. S. 972.

I

We consider first the claim that these appeals are moot. This claim is based upon the proposition, as stated in appellee Hartke's brief, that the "basic issue" before the Court is "whether appellee Hartke or appellant Roudebush is entitled to the office of United States Senator from Indiana." Since the Senate has now seated Hartke, and since this Court is without power to alter the Sen-

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[4] Direct appeals from such interlocutory orders are authorized by 28 U. S. C. § 1253.

[5] 117 Cong. Rec. 6.

ate's judgment,[6] it follows, the argument goes, that the cause is moot.

The difficulty with this argument is that it is based on an erroneous statement of the "basic issue." Which candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this Court even before the Senate acted.[7] The actual question before us, however, is a different one. It is whether an Indiana recount of the votes in the 1970 election is a valid exercise of the State's power, under Art. I, § 4, to prescribe the times, places, and manner of holding elections,[8] or is a forbidden infringement upon the Senate's power under Art. I, § 5.

That question is not moot, because the Senate has postponed making a final determination of who is entitled to the office of Senator, pending the outcome of this lawsuit. Once this case is resolved and the Senate is assured that it has received the final Indiana tally, the Senate will be free to make an unconditional and final judgment under Art. I, § 5. Until that judgment is made, this controversy remains alive, and we are obliged to consider it.[9]

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[6] See *Reed* v. *County Comm'rs*, 277 U. S. 376, 388: "[The Senate] is the judge of the elections, returns and qualifications of its members. Art. I, § 5. It is fully empowered, and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department."

[7] *Powell* v. *McCormack*, 395 U. S. 486.

[8] U. S. Const., Art. I, § 4, provides in pertinent part:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

[9] See *Powell* v. *McCormack, supra*, at 496.

II

It is the position of the appellants that, quite apart from the merits of the controversy, the three-judge District Court was barred from issuing an injunction by reason of 28 U. S. C. § 2283, which prohibits a federal court from enjoining state court proceedings except in a few specific instances.[10] This argument has weight, of course, only if the Indiana statutory recount procedure is a "proceeding in a State court" within the meaning of § 2283. This Court has said of a predecessor to § 2283,[11] "The provision expresses on its face the duty of 'hands off' by the federal courts in the use of the injunction to stay *litigation* in a state court." [12] More recently, we characterized the statute as designed to assure "the maintenance of state judicial systems for the decision of *legal controversies.*" [13]

We have in the past recognized that not every state court function involves "litigation" or "legal controversies." In the case of *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210, the Court reviewed a federal injunction preventing a state commission from fixing passenger rail rates. The Court assumed that the commission had the powers of a state court and that the predecessor of § 2283 governed any attempt by a federal court to enjoin the exercise of the commission's judicial powers.

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[10] Title 28 U. S. C. § 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[11] The statute dates from 1793. Act of Mar. 2, 1793, § 5, 1 Stat. 334.

[12] *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 132. (Emphasis supplied.)

[13] *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U. S. 281, 285. (Emphasis supplied.)

Nevertheless, the Court concluded that rate-making could be enjoined because it was legislative in nature. Hence, the Court held that § 2283 does not restrict a federal court from enjoining a state court when it is involved in a nonjudicial function.

To determine whether an Indiana court engages in a judicial function in connection with an election recount, we turn to the law of that State.[14] In Indiana every candidate has a right to a recount and can obtain one by merely filing a timely petition in the circuit or superior court of the appropriate county. If the petition is correct as to form, the state court "shall . . . grant such petition . . . and order the recount . . . ." When it grants a petition, the court is required to appoint three commissioners to carry out the recount. Once these appointments are made, the Indiana court has no other responsibilities or powers.[15]

The exercise of these limited responsibilities does not constitute a court proceeding under § 2283 within the test of *Prentis:* "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end." 211 U. S., at 226. The state courts' duties in connection with a recount may be characterized as ministerial, or perhaps administrative, but they clearly do not fall within this definition of a "judicial inquiry." The process of determining that the recount petition is correct as to form—that it contains the proper information, such as the names and addresses of all candidates, and is timely filed—is clearly not a judicial proceeding. Nonjudicial functionaries

[14] See *Hill* v. *Martin*, 296 U. S. 393, 398.

[15] Ind. Ann. Stat. §§ 29–5401 through 29–5417. The election recount provisions of some other States appear to give the state courts a broader function. See, *e. g.*, Conn. Gen. Stat. Rev. § 9–323; Va. Code Ann. § 24–277.1 (1969).

continually make similar determinations in the processing of all kinds of applications.[16]

And finally, Hartke's complaint in this cause did not ask the three-judge federal court to restrain the action of the Indiana court as such. It did not seek to enjoin the state court from ruling on the formal correctness of the petition; it did not even seek to enjoin the state court's appointive function. It sought, rather, to enjoin the recount commission from proceeding after the court had appointed the members of the commission.[17]

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[16] The role of the Indiana courts in this connection is not unlike that of the state court in the case of *Public Service Co. of Northern Illinois* v. *Corboy*, 250 U. S. 153. A state statute there authorized property owners to petition a state court to establish a drainage district and to construct a drainage ditch. To assist in the planning of a ditch, the state court was empowered to appoint a drainage commissioner. The commissioner served on a commission that submitted plans for construction. The state court could either accept or reject these submissions. If it approved plans, the court allocated funds and supervised construction. Applying *Prentis*, this Court held that these activities were not judicial, and that enjoining the construction of a drainage ditch was not enjoining a state court "proceeding." See also *Central Electric & Gas Co.* v. *City of Stromsburg*, 192 F. Supp. 280, aff'd, 289 F. 2d 217 (federal court could enjoin a state court's appointment of an appraiser pursuant to a state statute); *Central R. Co. of New Jersey* v. *Martin*, 19 F. Supp. 82, aff'd *sub nom. Lehigh Valley R. Co.* v. *Martin*, 100 F. 2d 139 (federal court could enjoin ministerial act of state judge, pursuant to state statute, converting a state tax into a lien against the taxpayer); *Weil* v. *Calhoun*, 25 F. 865 (federal court could enjoin a state ordinary, having the powers of a probate judge, from declaring the results of a county election).

[17] The only injunctive relief sought in Hartke's amended complaint was "that the court permanently restrain and enjoin the defendants and restraining and enjoining the defendants Samuel Walker, John R. Hammond and Duge Butler [the recount commissioners] from convening and commencing a recount, and the defendant Richard L. Roudebush and all persons acting in his behalf or in concert with him [from] taking any further action to use said machinery and procedures to carry forward a recount of the vote

We conclude that the three-judge District Court was not prohibited by § 2283 from issuing and had power under 28 U. S. C. § 2281 to issue, an injunction in this cause.

III

We turn, therefore, to the merits of the District Court's decision. The Indiana Election Code calls for the vote to be initially counted, in each precinct, by an election board. After recording the voting machine totals, the board seals the machines. Paper ballots, including absentee ballots, are then counted and tallied. Counted ballots are placed in a bag and sealed. Ballots that bear distinguishing marks or are mutilated or do not clearly reveal the voter's choice are not counted. These rejected ballots are sealed in a separate bag. Both bags are preserved for six months and may not be opened except in the case of a recount.[18]

If a recount is conducted in any county, the voting machine tallies are checked and the sealed bags containing the paper ballots are opened. The recount commission may make new and independent determinations as to which ballots shall be counted. In other words, it may reject ballots initially counted and count ballots initially rejected. Disputes within the commission are settled by a majority vote. When the commission finishes its task it seals the ballots it counted in one bag, and the ballots it rejected in another. Once the recount is completed, all previous returns are superseded.[19]

The District Court held these procedures to be contrary to the Constitution in two ways. First, the court found that in making judgments as to which ballots to

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for the office of United States Senator in the general election of November 3, 1970." An interlocutory injunction against the same defendants was also sought.

[18] Ind. Ann. Stat. §§ 29–5201 through 29–5220.

[19] Ind. Ann. Stat. §§ 29–5401 through 29–5417.

count, the recount commission would be judging the qualifications of a member of the Senate. It held this would be a usurpation of a power that only the Senate could exercise. Second, it found that the Indiana ballots and other election paraphernalia would be essential evidence that the Senate might need to consider in judging Hartke's qualifications. The court feared that the recount might endanger the integrity of those materials and increase the hazard of their accidental destruction. Thus, the court held that, even if the commission would not be usurping the Senate's exclusive power, it would be hindering the Senate's exercise of that power.

We cannot agree with the District Court on either ground.[20] Unless Congress acts, Art. I, § 4, empowers the States to regulate the conduct of senatorial elections.[21] This Court has recognized the breadth of those powers: "It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the

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[20] The District Court cited three cases decided by the Indiana Supreme Court as authority for its rulings. *State ex rel. Batchelet* v. *Dekalb Circuit Court*, 248 Ind. 481, 229 N. E. 2d 798; *State ex rel. Beaman* v. *Circuit Court of Pike County*, 229 Ind. 190, 96 N. E. 2d 671; *State ex rel. Acker* v. *Reeves*, 229 Ind. 126, 95 N. E. 2d 838. These cases held that the Indiana Constitution prohibited recounts in certain state elections. They do not address the federal constitutional question at issue in this cause.

[21] See n. 8, *supra*.

fundamental right involved." *Smiley* v. *Holm*, 285 U. S. 355, 366.

Indiana has found, along with many other States, that one procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount. Despite the fact that a certificate of election may be issued to the leading candidate within 30 days after the election, the results are not final if a candidate's option to compel a recount is exercised.[22] A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, § 4.

It is true that a State's verification of the accuracy of election results pursuant to its Art. I, § 4, powers is not totally separable from the Senate's power to judge elections and returns. But a recount can be said to "usurp" the Senate's function only if it frustrates the Senate's ability to make an independent final judgment. A recount does not prevent the Senate from independently evaluating the election any more than the initial count does. The Senate is free to accept or reject the

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[22] The Secretary of State is required by statute to certify to the Governor the leading candidate as duly elected "as soon as he shall receive" certified statements from the counties. The statutory period for receiving those statements is 26 days. The Governor is required to give a certificate of election to each certified candidate. Ind. Ann. Stat. §§ 29–5306 through 29–5309.

A petition for a recount may be filed 15 days after the election is held. § 29–5403. The petition cannot be granted nor the recount commission appointed by the court for another 25 days. § 29–5409. The recount may not commence until at least five days after the commission is appointed. § 29–5411. Additional time elapses before the results are made final and the appropriate persons are notified. Thus, the recount is unlikely to be completed before the Governor becomes obligated by statute to issue a certificate of election based on the initial count. Nevertheless, the recount supersedes the initial count even though a certificate of election may have been issued. § 29–5415.

apparent winner in either count,[23] and, if it chooses, to conduct its own recount.[24]

It would be no more than speculation to assume that the Indiana recount procedure would impair such an independent evaluation by the Senate. The District Court's holding was based on a finding that a recount would increase the probability of election fraud and accidental destruction of ballots. But there is no reason to suppose that a court-appointed recount commission would be less honest or conscientious in the performance of its duties than the precinct election boards that initially counted the ballots.

For the reasons expressed, we conclude that Art. I, § 5, of the Constitution, does not prohibit Indiana from conducting a recount of the 1970 election ballots for United States Senator. Accordingly, the judgment of the District Court is reversed.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of these cases.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting in part.

While I agree with the Court that the cases are not moot and that the three-judge court was not barred by 28 U. S. C. § 2283 from issuing an injunction, I disagree on the merits.

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[23] The Senate's power to judge the qualifications of its members is limited to the qualifications expressly set forth in the Constitution. *Powell* v. *McCormack*, 395 U. S. 486. One of those qualifications is that a Senator be elected by the people of his State. U. S. Const., Amend. XVII.

[24] The Senate itself has recounted the votes in close elections in States where there was no recount procedure. *E. g.*, *O'Conor* v. *Markey*, Senate Election, Expulsion and Censure Cases from 1789 to 1960, S. Doc. No. 71, 87th Cong., 2d Sess., 144 (1962).

By virtue of Art. I, § 5, Senate custom, and this Court's prior holdings, the Senate has exclusive authority to settle a recount contest once the contestee has been certified and seated, albeit conditionally.

Article I, § 5, provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." To implement this authority, the Senate has established a custom of resolving disagreements over which of two or more candidates in a senatorial race attracted more ballots. The apparent loser may initiate the process by filing with the Senate a petition stating (a) what voting irregularities he suspects, and (b) how many votes were affected. Upon receipt of such a petition, a special committee may be authorized to investigate the charges alleged. If the allegations are not frivolous and would be sufficient, if true, to alter the apparent outcome of the election, actual ballots may be and have been subpoenaed to Washington for recounting by the committee. Also, witnesses may be required to testify. The committee performs the function of deciding both the factual issues and what allegations would be sufficient to warrant favorable action on a petition.

Thus, in the Iowa senatorial campaign of 1924, Smith Brookhart was the apparent winner over Daniel Steck, who filed with the Senate the complaint that illegal votes had been cast for his opponent. The petition was referred to the Subcommittee on Privileges and Elections which was authorized to make a full investigation. It heard testimony and recounted the ballots in Washington. The committee and eventually the Senate agreed that, contrary to earlier assumptions, Steck had won. Accordingly, Brookhart was replaced by Steck as a Senator from Iowa. See *Steck* v. *Brookhart*, Senate Election, Expulsion and Censure Cases from 1789 to 1960, S. Doc. No. 71, 87th Cong., 2d Sess., 116–117 (1962). See also *Hurley* v. *Chavez*, *id.*, at 151 (upon re-

counting, the subcommittee and the Senate found that neither candidate had won and the seat was declared vacant); *Sweeney* v. *Kilgore, id.*, at 145 (adjustments for fraudulent campaign tactics were insufficient to reverse official outcome); *O'Conor* v. *Markey, id.*, at 144 (recount of all votes cast in 1946 Maryland race revealed too few mistakes to cause reversal in outcome); *Willis* v. *Van Nuys, id.*, at 138–139 (petition rejected as insufficient grounds for recount); *Bursum* v. *Bratton, id.*, at 114 (recount will not be conducted absent a showing of grounds to doubt the accuracy of official count).

The Senate's procedure is flexible:

> "The Senate has never perfected specific rules for challenging the right of a claimant to serve, inasmuch as each case presents different facts. The practice has been to consider and act upon each case on its own merits, although some general principles have been evolved from the precedents established.
>
> "This practice of viewing each case affecting claims to membership on its individual merits has resulted in a variety of means by which the cases are originated. The Senator-elect to a seat in the Senate generally appears with his credentials. On some occasions, when these credentials are presented, some Senators will submit a motion that the credentials be referred to the Committee on Rules and Administration, and that, pending report, he be denied the privilege of taking the oath of office. Upon adoption of such a motion, the Senator-elect steps aside and the Senate seat is vacant for the time being. Any question or motion arising or made upon the presentation of such credentials is privileged and would be governed by a majority vote.
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> "On other occasions, the Senator-elect is permitted to take the oath of office, and this is now regarded and

followed as the proper procedure, but thereafter inquiry as to his election is undertaken by the Senate. Resolutions calling for such investigations may be offered by any Senator. In an instance where a newspaper charged a Senator had obtained his office by illegal means, the Senator himself offered a resolution calling for an investigation of the charges.

"The usual origin of such cases, however, is by petition. The contestant may file such a petition, protesting the seating of the contestee, and asserting his own right to the seat in question. It is not required to be filed prior to the swearing-in of the contestee, and no rights are lost if filed afterwards. In some cases, petitions have been signed and filed by others than the contestant, simply protesting against the seating of the contestee, without asserting any claim in behalf of the defeated candidate. Any number of citizens may submit such a petition; and it might make charges of illegal practices in the election, or of the improper use of money, or even of the unfitness of the claimant to serve in the United States Senate.

"A petition of contest is addressed to the U. S. Senate, and may be laid before the Senate by the presiding officer or formally presented by some Senator. There is no prescribed form for such a petition. It is somewhat analogous to a complaint filed in a lawsuit. It customarily sets forth the grounds or charges upon which the contest is based, and in support of which proof is expected to be adduced. The petition is usually referred to the Committee on Rules and Administration, which has jurisdiction over '. . . matters relating to the election of the President, Vice President, or Members of Congress; corrupt practices; contested elections; credentials and qualifications; [and] Federal elections generally . . . .'

> "The Legislative Reorganization Act of 1946 empowers each standing committee of the Senate, including any subcommittee of any such committee, to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures (not in excess of $10,000 for each committee during any Congress) as it deems advisable. Each such committee may make investigations into any matter within its jurisdiction and may report such hearings as may be had by it." S. Doc. No. 71, 87th Cong., 2d Sess., vii–viii (1962).

The parties before the Court are apparently in agreement that, as is true of several other arenas of public decisionmaking, there has been a "textually demonstrable constitutional commitment" (*Baker* v. *Carr*, 369 U. S. 186, 217; *Powell* v. *McCormack*, 395 U. S. 486, 518–549) to the Senate of the decision whether Hartke or Roudebush received more lawful votes. Our case law agrees. Both *Barry* v. *Cunningham*, 279 U. S. 597, and *Reed* v. *County Comm'rs*, 277 U. S. 376, were generated during the disputed 1926 senatorial election in Pennsylvania in which William Vare appeared to have defeated William Wilson. In 1926 a Senate committee was authorized to inquire into the means used to influence the nomination of candidates in that election. The committee asked some local county commissioners to produce certain ballots but were refused, whereupon members of the committee sought a federal court order compelling the ballots' production. On appeal, this Court held that because the Senate had been fully competent to use its own subpoena power to secure the ballots, the District Court had lacked jurisdiction to act only at

the behest of the committee. In the course of discussing the committee's scope of authority the Court said:

> "The resolutions are to be construed having regard to the power possessed and customarily exerted by the Senate. It is the judge of the elections, returns and qualifications of its members. Art. I, § 5. It is fully empowered, and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department. That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections." 277 U. S., at 388.

In *Barry* v. *Cunningham, supra,* the Court upheld the Senate's power under Art. I, § 5, to call witnesses before it in order to determine the factual history of the same controverted 1926 election involved in *Reed.* In answer to the argument that Vare had not been a member of the Senate inasmuch as he was unseated (and therefore the witness was relieved of the duty to answer inquiries) the Court held:

> "It is enough to say . . . that upon the face of the returns [Vare] had been elected and had received a certificate from the Governor of the state to that effect. Upon these returns and with this certificate, he presented himself to the Senate, claiming all the rights of membership. Thereby, the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right immediately attached by virtue of § 5 of Article I of the Constitution." *Barry* v. *Cunningham, supra,* at 614.

And *Cunningham* holds that, "The Senate, having *sole* authority under the Constitution to judge of the elections, returns and qualifications of its members, may exer-

cise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute." *Id.*, at 619 (emphasis added). Judicial interference with this "indubitable power" was said to be possible only upon a clear showing of "such arbitrary and improvident use of the power as will constitute a denial of due process of law." *Id.*, at 620.

Once certification by the Governor has been presented to the Senate, a State may not by conducting a recount alter the outcome of the election—a principle that has been widely recognized by state courts. See *Laxalt* v. *Cannon*, 80 Nev. 588, 397 P. 2d 466, and cases cited therein.

Thus, although the Houses of Congress may not engraft qualifications for membership beyond those already contained in Art. I, *Powell* v. *McCormack*, 395 U. S. 486, where all that is at stake is a determination of which candidates attracted the greater number of lawful ballots, each has supreme authority to resolve such controversies.[1]

Although all agree that in the end the Senate will be the final judge of this seating contest, the nub of the instant case comes down to opposing positions on how important it may be to preserve for the Senate the opportunity to ground its choice in unimpeachable evidence. It is with regard to this phase of the cases that I disagree with the majority.

The Senate may conclude that only a recomputation supervised by it under laboratory conditions could serve as an acceptable guide for decision. Such a recomputation, however, will not be possible once local investigators have exposed these presently sealed ballots to human judgment.

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[1] Several areas of decisionmaking are immune from judicial review by federal courts. The cases are reviewed in *Baker* v. *Carr*, 369 U. S. 186.

Obviously, state officials might desire to preview these presently sealed ballots in order to influence the Senate's deliberations.

Charges or suspicions of inadvertent or intentional alteration, however baseless, will infect the case. No longer will the constitutionally designated tribunal be able to bottom its result on unassailed evidence. Since even a slight adjustment in the tally could dramatically reverse the outcome, the federal interest in preserving the integrity of the evidence is manifest.

What the Senate should do in the merits is not a justiciable controversy. The role of the courts is to protect the Senate's exclusive jurisdiction over the subject matter, as did this Court in *Barry* v. *Cunningham, supra.* The Senate's Subcommittee on Privileges and Elections, for example, might subpoena these ballots, thereby precluding, as a practical matter, any local recount. Or the Senate might ask for a local recount. Either course is within the control and discretion of the Senate and is unreviewable by the courts. The District Court had jurisdiction only to protect the Senate's choice,[2] not to make the choice for or on behalf of the Senate.

I would affirm the judgment of the District Court.

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[2] Cf. *Ex parte Peru,* 318 U. S. 578.

PARISI *v.* DAVIDSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70–91. Argued October 19–20, 1971—Decided February 23, 1972

Petitioner, a member of the armed forces, applied unsuccessfully for discharge as a conscientious objector. After he had exhausted all his administrative remedies, he filed a habeas corpus petition in Federal District Court, claiming that the Army's denial of his application was without basis in fact. Thereafter court-martial charges were brought against him, and the District Court ordered consideration of the petition deferred until final determination of the court-martial proceedings. The Court of Appeals affirmed. *Held:* The District Court should not have stayed its hand in this case. Pp. 37–45.

(a) All alternative administrative remedies have been exhausted by petitioner. Pp. 37–39.

(b) Since the military judicial system in its processing of the court-martial charge could not provide the discharge sought by petitioner with promptness and certainty, the District Court should proceed to determine the habeas corpus claim despite the pendency of the court-martial proceedings. Pp. 39–45.

435 F. 2d 299, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion concurring in the result, *post*, p. 46. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Richard L. Goff argued the cause for petitioner. With him on the briefs were *George A. Blackstone* and *Stephen V. Bomse.*

William Terry Bray argued the cause for respondents. On the brief were *Solicitor General Griswold, Assistant Attorney General Mardian, William Bradford Reynolds, Robert L. Keuch,* and *Robert A. Crandall.*

MR. JUSTICE STEWART delivered the opinion of the Court.

When a member of the armed forces has applied for a discharge as a conscientious objector and has exhausted all avenues of administrative relief, it is now settled that he may seek habeas corpus relief in a federal district court on the ground that the denial of his application had no basis in fact. The question in this case is whether the district court must stay its hand when court-martial proceedings are pending against the serviceman.

The petitioner, Joseph Parisi, was inducted into the Army as a draftee in August 1968. Nine months later he applied for a discharge as a conscientious objector, claiming that earlier doubts about military service had crystallized into a firm conviction that any form of military activity conflicted irreconcilably with his religious beliefs. He was interviewed by the base chaplain, the base psychiatrist, and a special hearing officer. They all attested to the petitioner's sincerity and to the religious content of his professed beliefs. In addition, the commanding general of the petitioner's Army training center and the commander of the Army hospital recommended that the petitioner be discharged as a conscientious objector. His immediate commanding officer, an Army captain, disagreed, recommending disapproval of the application on the ground that the petitioner's beliefs were based on essentially political, sociological, or philosophical views, or on a merely personal moral code.

In November 1969, the Department of the Army denied the petitioner conscientious objector status, on the grounds that his professed beliefs had become fixed prior to entering the service and that his opposition to war was not truly based upon his religious beliefs. On November 24, 1969, the petitioner applied to the Army Board for Correction of Military Records (hereafter

sometimes ABCMR) for administrative review of that determination.

Four days later the petitioner commenced the present habeas corpus proceeding in the United States District Court for the Northern District of California, claiming that the Army's denial of his conscientious objector application was without basis in fact. He sought discharge from the Army and requested a preliminary injunction to prevent his transfer out of the jurisdiction of the District Court and to prohibit further training preparatory to being transferred to Vietnam. The District Court declined at that time to consider the merits of the habeas corpus petition, but it retained jurisdiction pending a decision by the ABCMR, and in the meantime enjoined Army authorities from requiring the petitioner to participate in activity or training beyond his current noncombatant duties.

Shortly thereafter the petitioner received orders to report to Fort Lewis, Washington, for deployment to Vietnam, where he was to perform noncombatant duties similar to those that had been assigned to him in this country. He sought a stay of this redeployment order pending appeal of the denial of habeas corpus, but his application was denied by the Court of Appeals, on the condition that the Army would produce him if the appeal should result in his favor. A similar stay application was subsequently denied by MR. JUSTICE DOUGLAS as Ninth Circuit Justice, *Parisi* v. *Davidson*, 396 U. S. 1233. The petitioner then reported to Fort Lewis. He refused, however, to obey a military order to board a plane for Vietnam. As a result, he was charged with violating Art. 90 of the Uniform Code of Military Justice, 10 U. S. C. § 890, and, on April 8, 1970, a court-martial convicted him of that military offense.[1]

[1] At the time of oral argument of the present case, an appeal from this conviction was pending in a court of military review.

While the court-martial charges were pending, the Army Board for Correction of Military Records notified the petitioner that it had rejected his application for relief from the Army's denial of his conscientious objector application. The District Court then ordered the Army to show cause why the pending writ of habeas corpus should not issue. On the Government's motion, the District Court, on March 31, 1970, entered an order deferring consideration of the habeas corpus petition until final determination of the criminal charge then pending in the military court system. The Court of Appeals for the Ninth Circuit affirmed this order, concluding that "habeas proceedings were properly stayed pending the final conclusion of Parisi's military trial and his appeals therefrom," 435 F. 2d 299, 302. We granted certiorari, 402 U. S. 942.

In affirming the stay of the petitioner's federal habeas corpus proceeding until completion of the military courts' action, the Court of Appeals relied on the related doctrines of exhaustion of alternative remedies and comity between the federal civilian courts and the military system of justice. We hold today that neither of these doctrines required a stay of the habeas corpus proceedings in this case.

With respect to available *administrative* remedies, there can be no doubt that the petitioner has fully met the demands of the doctrine of exhaustion—a doctrine that must be applied in each case with an "understanding of its purposes and of the particular administrative scheme involved." *McKart* v. *United States,* 395 U. S. 185, 193. The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies. *Id.,* at 194–195;

McGee v. *United States*, 402 U. S. 479, 485; K. Davis, Administrative Law Treatise § 20.01 *et seq.* (Supp. 1970).

In this case the petitioner fully complied with Army Regulation 635–20, which dictates the procedures to be followed by a serviceman seeking classification as a conscientious objector on the basis of beliefs that develop after induction.[2] Moreover, following a rule of the Ninth Circuit then in effect,[3] he went further and appealed to the Army Board for Correction of Military Records.[4] The procedures and corrective opportunities

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[2] The right of a person in the armed forces to be classified as a conscientious objector after induction is bottomed on Department of Defense Directive No. 1300.6 (May 10, 1968), issued by the Secretary of Defense pursuant to his authority under 10 U. S. C. § 133. The purpose of the directive is to provide "uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection." Army Regulation 635–20 was issued to effectuate the broader policies announced in DOD Directive No. 1300.6.

[3] Under the rule of *Craycroft* v. *Ferrall*, 408 F. 2d 587 (CA9 1969), the petitioner was required to appeal the Department of the Army's decision to the civilian Army Board for Correction of Military Records in order to exhaust military administrative remedies and have access to federal court. Current governmental policy rejects *Craycroft*. Compliance with Army Regulation 635–20, not perfection of an ABCMR appeal, marks the point when military administrative procedures have been exhausted. Department of Justice Memo. No. 652 (Oct. 23, 1969). In *Craycroft* v. *Ferrall*, 397 U. S. 335, this Court vacated the judgment of the Ninth Circuit that the petitioner there had to appeal to the Board for the Correction of Naval Records before proceeding in federal court. But our decision was announced on March 30, 1970, more than four months after the present petitioner had appealed to the ABCMR.

[4] In 1946, Congress enacted legislation empowering the service secretaries, acting through boards of civilian officers of their respective departments, to alter military records when necessary to prevent injustice. Legislative Reorganization Act of 1946, § 207, 60 Stat. 837, as amended by 70A Stat. 116, 10 U. S. C. § 1552 (1952

of the military administrative apparatus had thus been wholly utilized at the time the District Court entered its order deferring consideration of the petitioner's habeas corpus application.

It is clear, therefore, that, if the court-martial charge had not intervened, the District Court would have been wrong in not proceeding to an expeditious consideration of the merits of the petitioner's claim. For the writ of habeas corpus has long been recognized as the appropriate remedy for servicemen who claim to be unlawfully retained in the armed forces. See, *e. g.*, *Eagles* v. *Samuels*, 329 U. S. 304, 312; *Oestereich* v. *Selective Service Board*, 393 U. S. 233, 235; *Schlanger* v. *Seamans*, 401 U. S. 487, 489. And, as stated at the outset, that writ is available to consider the plea of an in-service applicant for discharge as a conscientious objector who claims that exhaustion of military administrative procedures has led only to a factually baseless denial of his application. *In re Kelly*, 401 F. 2d 211 (CA5); *Hammond* v. *Lenfest*, 398 F. 2d 705 (CA2).[5]

But since a court-martial charge was pending against the petitioner when he sought habeas corpus in March 1970, the respondents submit that the Court of Appeals was correct in holding that the District Court must

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ed., Supp. IV). Pursuant to this legislation, each service established a board for the correction of military records whose function is, on application by a serviceman, to review the military record and intervene where necessary to correct error or remove injustice. 10 U. S. C. § 1552 (a).

[5] The Department of Justice, in consultation with the Department of Defense, has accepted the holdings of the *Kelly* and *Hammond* cases. Department of Justice Memo. No. 652 (Oct. 23, 1969). See *United States ex rel. Brooks* v. *Clifford*, 409 F. 2d 700, 701 (CA4). Compare *Noyd* v. *McNamara*, 378 F. 2d 538 (CA10), with *Polsky* v. *Wetherill*, 403 U. S. 916, vacating judgment in 438 F. 2d 132 (CA10).

await the final outcome of those charges in the military judicial system before it may consider the merits of the petitioner's habeas corpus claim. Although this argument, too, is framed in terms of "exhaustion," it may more accurately be understood as based upon the appropriate demands of comity between two separate judicial systems.[6] Requiring the District Court to defer to the military courts in these circumstances serves the interests of comity, the respondents argue, by aiding the military judiciary in its task of maintaining order and discipline in the armed services and by eliminating "needless friction" between the federal civilian and military judicial systems. The respondents note that the military constitutes a "specialized community governed by a separate discipline from that of the civilian," *Orloff* v. *Willoughby*, 345 U. S. 83, 94; *Gusik* v. *Schilder*, 340 U. S. 128, and that in recognition of the special nature of the military community, Congress has created an autonomous military judicial system, pursuant to Art. I,

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[6] The respondents do not contend that the military courts have a special competence in determining if a conscientious objector application has been denied without basis in fact. As they acknowledge in their brief:

"Plainly, judicial review of the factual basis for the Army's denial of petitioner's conscientious objector claim does not require an interpretation of 'extremely technical provisions of the Uniform Code [of Military Justice] which have no analogs in civilian jurisprudence,'" quoting *Noyd* v. *Bond*, 395 U. S. 683, 696.

Thus, it is not contended that exhaustion of military court remedies—like exhaustion of military administrative remedies—is required by the principles announced in *McKart* v. *United States*, 395 U. S. 185, and *McGee* v. *United States*, 402 U. S. 479.

The concept of "exhaustion" in the context of the demands of comity between different judicial systems is closely analogous to the doctrine of abstention. For a discussion of the exhaustion and abstention doctrines in the federal-state context, see generally C. Wright, Handbook of the Law of Federal Courts 186–188, 196–208 (2d ed. 1970).

§ 8, of the Constitution.[7] They further point out that civilian courts, out of respect for the separation-of-powers doctrine and for the needs of the military, have rightly been reluctant to interfere with military judicial proceedings.[8]

But the issue in this case does not concern a federal district court's direct intervention in a case arising in the military court system. Cf. *Gusik* v. *Schilder, supra; Noyd* v. *Bond,* 395 U. S. 683. The petitioner's application for an administrative discharge—upon which the habeas corpus petition was based—antedated and was independent of the military criminal proceedings.

The question here, therefore, is whether a federal court should postpone adjudication of an independent civil lawsuit clearly within its original jurisdiction. Under accepted principles of comity, the court should stay its hand only if the relief the petitioner seeks—discharge as a conscientious objector—would also be available to him with reasonable promptness and certainty through the machinery of the military judicial system in its

[7] Barker, Military Law—A Separate System of Jurisprudence, 36 U. Cin. L. Rev. 223 (1967); Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181 (1962). Military courts are legislative courts; their jurisdiction is independent of Art. III judicial power. Following World War II, Congress, in an attempt to reform and modernize the system of military law, created the Uniform Code of Military Justice, Act of May 5, 1950, c. 169, 64 Stat. 107. In 1968, the Code was amended by the Military Justice Act, 10 U. S. C. § 819, to improve court-martial and review procedures.

[8] See *Hammond* v. *Lenfest,* 398 F. 2d 705, 710 (CA2 1968):

"Judicial hesitancy when faced with matters touching on military affairs is hardly surprising in view of the doctrine of separation of powers and the responsibility for national defense which the Constitution . . . places upon the Congress and the President. Moreover, the ever-present and urgent need for discipline in the armed services would alone explain the relative freedom of the military from judicial supervision."

processing of the court-martial charge. *Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218, 229; *Davis* v. *Mann,* 377 U. S. 678, 690–691; *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U. S. 713, 716–717. For the reasons that follow, we are not persuaded that such relief would be even potentially available, much less that it would be either prompt or certain.

Courts-martial are not convened to review and rectify administrative denials of conscientious objector claims or to release conscientious objectors from military service. They are convened to adjudicate charges of criminal violations of military law. It is true that the Court of Military Appeals has held that a soldier charged in a court-martial with refusal to obey a lawful order may, in certain limited circumstances, defend upon the ground that the order was not lawful because he had wrongfully been denied an administrative discharge as a conscientious objector. *United States* v. *Noyd,* 18 U. S. C. M. A. 483, 40 C. M. R. 195.[9] The scope of the *Noyd* doctrine is narrow, *United States* v. *Wilson,* 19 U. S. C. M. A. 100,

[9] Army Regulation 635–20 provides that

"individuals who have submitted formal applications [for conscientious objector status] . . . will be retained in their units and assigned duties providing the minimum practicable conflict with their asserted beliefs pending a final decision on their applications."

Noyd involved an Air Force officer who, after being denied conscientious objector status, refused to obey an order to instruct student pilots to fly a fighter plane used in Vietnam. Noyd's commanding officer had refrained from ordering the accused to give such instruction until the application had been processed and denied. As the Court of Military Appeals said:

"The validity of the order [to instruct students], therefore, depended upon the validity of the Secretary's decision [rejecting the conscientious objector application] . . . If the Secretary's decision was illegal, the order it generated was also illegal." *United States* v. *Noyd,* 18 U. S. C. M. A. 483, 492, 40 C. M. R. 195, 204.

41 C. M. R. 100, and its present vitality not wholly clear, *United States* v. *Stewart,* 20 U. S. C. M. A. 272, 43 C. M. R. 112. A *Noyd* defense, therefore, would be available, even arguably, only in an extremely limited category of court-martial proceedings. But even though we proceed on the assumption that *Noyd* offered this petitioner a potential affirmative defense to the court-martial charge brought against him,[10] the fact remains that the *Noyd* doctrine offers, at best, no more than a defense to a criminal charge. Like any other legal or factual defense, it would, if successfully asserted at trial or on appeal, entitle the defendant to only an acquittal [11]—not to the discharge from military service that he seeks in the habeas corpus proceeding.

The respondents acknowledge, as they must, the limited function of a *Noyd* defense in the trial and appeal of the court-martial proceeding itself. But they suggest that, if the military courts should eventually acquit the petitioner on the ground of his *Noyd* defense, then the petitioner may have "an available remedy by way of habeas corpus in the Court of Military Appeals." [12] In support of this suggestion, the respondents point to the All Writs Act, 28 U. S. C. § 1651 (a), and to cases in which the Court of Military Appeals has exercised

[10] The petitioner did, in fact, interpose a *Noyd* defense at his court-martial trial, and it was rejected upon the military judge's finding that "the ruling of the Secretary of the Army was not arbitrary, capricious, unreasonable, or an abusive [*sic*] discretion."

[11] We have been referred to no reported military court decision (including *Noyd* itself) that has yet acquitted a defendant upon the basis of a *Noyd* defense.

[12] If the military courts should ultimately acquit the petitioner on grounds other than wrongful denial of his conscientious objector application, the respondents acknowledge that he could not seek habeas corpus in the military judicial system. In this event, therefore, the petitioner could clearly not obtain the relief that he seeks in the military court system.

power under that Act to order servicemen released from military imprisonment pending appeals of their court-martial convictions. See *Noyd* v. *Bond*, 395 U. S., at 695; *Levy* v. *Resor*, 17 U. S. C. M. A. 135, 37 C. M. R. 399; *United States* v. *Jennings*, 19 U. S. C. M. A. 88, 41 C. M. R. 88; *Johnson* v. *United States*, 19 U. S. C. M. A. 407, 42 C. M. R. 9.

But the All Writs Act only empowers courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ," and the jurisdiction of the Court of Military Appeals is limited by the Uniform Code of Military Justice to considering appeals from court-martial convictions. 10 U. S. C. § 867; *United States* v. *Snyder*, 18 U. S. C. M. A. 480, 40 C. M. R. 192. That court has been given no "jurisdiction" to consider a serviceman's claim for discharge from the military as a conscientious objector.

Whether this conceptual difficulty might somehow be surmounted is a question for the Court of Military Appeals itself ultimately to decide. See *United States* v. *Bevilacqua*, 18 U. S. C. M. A. 10, 12, 39 C. M. R. 10, 12. But the short answer to the respondents' suggestion in this case is the respondents' own concession that that court has, to date, never so much as intimated that it has power to issue a writ of habeas corpus granting separation from military service to a conscientious objector. We conclude here, therefore, as in *Noyd* v. *Bond*, *supra*, at 698 n. 11, that the petitioner cannot "properly be required to exhaust a remedy which may not exist." [13] Accordingly, we reverse the judg-

[13] This result is not inconsistent with the need to maintain order and discipline in the military and to avoid needless friction between the federal civilian and military judicial systems. If the *Noyd* defense is available and if the order that the petitioner disobeyed was unlawful if his conscientious objector claim is valid, then allowing him to proceed in federal district court as soon as military

ment of the Court of Appeals and remand the case to the District Court with directions to give expeditious consideration to the merits of the petitioner's habeas corpus application.

In holding as we do today that the pendency of court-martial proceedings must not delay a federal district court's prompt determination of the conscientious objector claim of a serviceman who has exhausted all administrative remedies, we no more than recognize the historic respect in this Nation for valid conscientious objection to military service. See 50 U. S. C. App. § 456 (j); *United States* v. *Seeger,* 380 U. S. 163.[14] As the Defense Department itself has recognized, "the Congress . . . has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces." Department of Defense Directive No. 1300.6 (May 10, 1968).

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administrative remedies have been exhausted does not affect military discipline. For if the conscientious objector claim is valid, the Army can have no interest in punishing him for disobedience of an unlawful order. If the conscientious objector claim is invalid, then the Army can, of course, prosecute the petitioner for his alleged disobedience of a lawful order.

Correlatively, if the charges in military court would be unaffected by the validity of the conscientious objector claim, both the petitioner's habeas corpus action and the criminal trial in military court could proceed concurrently. See n. 15, *infra.* Needless to say, the question whether wrongful denial of conscientious objector status may be raised as a defense against various types of military charges must remain with the military courts, as they exercise their special function of administering military law.

[14] See generally Report of the National Advisory Commission on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? 48–51 (1967); Selective Service System Monograph No. 11, Conscientious Objection (1950); Russell, Development of Conscientious Objector Recognition in the United States, 20 Geo. Wash. L. Rev. 409 (1952); Comment, God, the Army, and Judicial Review: The In-Service Conscientious Objector, 56 Calif. L. Rev. 379 (1968).

But our decision today should not be understood as impinging upon the basic principles of comity that must prevail between civilian courts and the military judicial system. See, *e. g., Noyd* v. *Bond,* 395 U. S. 683; *Burns* v. *Wilson,* 346 U. S. 137; *Orloff* v. *Willoughby,* 345 U. S. 83; *Gusik* v. *Schilder,* 340 U. S. 128. Accordingly, a federal district court, even though upholding the merits of the conscientious objector claim of a serviceman against whom court-martial charges are pending, should give careful consideration to the appropriate demands of comity in effectuating its habeas corpus decree.[15]

The judgment is reversed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring in the result.

I agree with the Court's view that habeas corpus is an overriding remedy to test the jurisdiction of the military to try or to detain a person. The classic case is *Ex parte Milligan,* 4 Wall. 2, where habeas corpus was issued on behalf of a civilian tried and convicted in Indiana by a military tribunal. During the Civil War all civil courts in that State were open and federal authority had always been unopposed. While the President

[15] In the present case the respondents acknowledge that if the administrative denial of the petitioner's conscientious objector claim had no basis in fact, then the court-martial charge against him is invalid. It follows that, if he should prevail in the habeas corpus proceeding, he is entitled to his immediate release from the military. At the other end of the spectrum is the hypothetical case of a court-martial charge that has no real connection with the conscientious objector claim—*e. g.*, a charge of stealing a fellow soldier's watch. In such a case, a district court, even though upholding the serviceman's conscientious objector claim, might condition its order of discharge upon the completion of the court-martial proceedings and service of any lawful sentence imposed.

and the Congress had "suspended" the writ, *id.*, at 115, the suspension, said the Court, went no further than to relieve the military from producing in the habeas corpus court the person held or detained. "The Constitution goes no further. It does not say after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it." *Id.*, at 126.

Mr. Chief Justice Taney in *Ex parte Merryman,* 17 F. Cas. 144 (No. 9,487) (CC Md. 1861), held that the President alone had no authority to suspend the writ, a position that Lincoln did not honor. To date, the question has never been resolved, and its decision is not relevant to the present case. I mention the matter because of the constitutional underpinning of the writ of habeas corpus. Article I of the Constitution, in describing the powers of the legislative branch, states in § 9 that: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Court has consistently reaffirmed the preferred place of the Great Writ in our constitutional system. *Fay* v. *Noia,* 372 U. S. 391, 400; *Smith* v. *Bennett,* 365 U. S. 708, 713.

Article III, § 1, gives Congress the power to "ordain and establish" inferior federal courts; and § 2 subjects the "appellate Jurisdiction" of this Court to "such Exceptions, and . . . such Regulations as the Congress shall make." Once Congress withdrew from this Court its appellate jurisdiction in habeas corpus cases. See *Ex parte McCardle,* 6 Wall. 318, 7 Wall. 506. An Act of Congress passed by the very first Congress provided for the issuance of the writ. But as Chief Justice Marshall said in *Ex parte Bollman,* 4 Cranch 75, 95, "for if the means be not in existence, the privilege

itself would be lost, although no law for its suspension should be enacted." It is also true that "the meaning of the term *habeas corpus*" is ascertained by resort "to the common law;" yet "the power to award the writ by any of the courts of the United States, must be given by written law." *Id.*, at 93–94.

What courts may do is dependent on statutes,[1] save as their jurisdiction is defined by the Constitution. What federal judges may do, however, is a distinct question. Authority to protect constitutional rights of individuals is inherent in the authority of a federal judge, conformably with Acts of Congress. The mandate in Art. I, § 9, that "The Privilege of the Writ . . . shall not be suspended" must mean that its issuance, in a proper case or controversy, is an implied power of any federal judge.

We have ruled that even without congressional statutes enforcing constitutional rights, the federal judges have authority to enforce the federal guarantee. *Fay* v. *New York*, 332 U. S. 261, 283–284, 285, 293; *Katzenbach* v. *Morgan*, 384 U. S. 641, 647. Those cases involved protests by individuals against state action. Certainly the military does not stand in a preferred position.

The matter is germane to the present problem. For here the military is charged with exceeding its proper bounds in seeking to punish a person for claiming his statutory and constitutional exemption from military serv-

[1] It has been assumed that this Court has no jurisdiction to issue an original writ of habeas corpus except when issuance of the writ has been first denied by a lower court. R. Stern & E. Gressman, Supreme Court Practice 419–420 (4th ed. 1969). But the Court has not settled the question. See *Hirota* v. *MacArthur*, 335 U. S. 876, 338 U. S. 197.

Some members of the Court have felt that, absent statutory authorization, the Court may not even transfer a petition for an original writ of habeas corpus to a lower court. But that view has not prevailed. See *Chaapel* v. *Cochran*, 369 U. S. 869.

ice. The conflict between military prerogatives and civilian judicial authority is as apparent in this case as it was in *Ex parte Milligan*. A person who appropriately shows that he is exempt from military duty may not be punished for failure to submit. The question is not one of comity between military and civilian tribunals. One overriding function of habeas corpus is to enable the civilian authority to keep the military within bounds. The Court properly does just that in the opinion announced today.

While the Court of Military Appeals has the authority to issue the writ of habeas corpus, *Noyd* v. *Bond*, 395 U. S. 683, 695 n. 7; *Levy* v. *Resor*, 17 U. S. C. M. A. 135, 37 C. M. R. 399, we have never held that a challenge to the military's jurisdiction to try a person must first be sought there rather than in a federal district court.[2] Of

[2] See *Billings* v. *Truesdell*, 321 U. S. 542. This case involved a Selective Service registrant whose conscientious objector claim was rejected by the service. Billings subsequently reported as ordered for induction, but refused to take the required oath. The oath was then read to him, and he was told that his refusal to take it made no difference; he was "in the army now." *Id.*, at 545. When Billings refused an order to submit to fingerprinting, military charges were brought against him.

While the charges were pending, Billings sought federal habeas corpus relief, challenging the military's jurisdiction to try him, on the theory that he had not been lawfully inducted. The District Court discharged the writ, and the Court of Appeals affirmed, but this Court held that Billings' induction had indeed violated existing statutory law, and ordered that the writ issue. Implicit in this holding is an affirmation of the proposition that exhaustion of military remedies, including pending court-martial, is not required of one challenging the military's jurisdiction to try him in the first instance.

While *Billings* was decided before the enactment of the Uniform Code of Military Justice, cases decided under the Code have reached similar results. See, *e. g.*, *McElroy* v. *Guagliardo*, 361 U. S. 281; *Reid* v. *Covert*, 354 U. S. 1; *Toth* v. *Quarles*, 350 U. S. 11.

Noyd v. *Bond*, 395 U. S. 683, is not to the contrary. There, the Court was faced with a serviceman who had refused to obey an order

course, where comity prevails, as it does between state and federal courts, federal habeas corpus will be denied where state habeas corpus or a like remedy is available but has not been utilized. *Ex parte Hawk*, 321 U. S. 114. A petitioner must, indeed, pursue his alleged state remedies until it is shown that they do not exist or have been futilely invoked.

The principle of comity was invoked by Congress when it wrote in 28 U. S. C. § 2254 that federal habeas corpus shall not be granted a person in state custody "unless it appears that the applicant has exhausted the remedies available in the courts of the State." That principle of comity is important in the operation of our federal system, for both the States and the Federal Government

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because of his asserted conscientious scruples against the war in Vietnam. His court-martial conviction was pending in the Court of Military Appeals. The issue decided against him on his federal habeas application, however, was not the jurisdiction of the military to try him in the first instance, but merely his entitlement to bail pending disposition of his military appeals. The Court held that his bail motion should first be presented to the Court of Military Appeals; but we were explicit in distinguishing *Guagliardo, Covert,* and *Toth:*

"The cited cases held that the Constitution barred the assertion of court-martial jurisdiction over various classes of civilians connected with the military, and it is true that this Court there vindicated complainants' claims without requiring exhaustion of military remedies. We did so, however, because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all. Neither of these factors is present in the case before us." 395 U. S., at 696 n. 8.

Thus, *Noyd* supports the proposition that "exhaustion is not required when a prisoner challenges the personal jurisdiction of the military." Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1233 n. 169. And Parisi's challenge is precisely of that nature.

are administering programs relating to criminal justice.[3] See *Fay* v. *Noia*, 372 U. S. 391. But "the principles of federalism which enlighten the law of federal habeas corpus for state prisoners are not relevant," *Noyd* v. *Bond*, 395 U. S., at 694, to analogous questions involving military prisoners. Military proceedings are different. As we said in *O'Callahan* v. *Parker*, 395 U. S. 258, 265, "A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."

Comity is "a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Darr* v. *Burford*, 339 U. S. 200, 204. But the Pentagon is not yet sovereign. The military is simply another administrative agency, insofar as judicial review is concerned. Cf. Comment, 43 S. Cal. L. Rev. 356, 377–378. While we have stated in the past that special deference is due the military decisionmaking process, *Gusik* v. *Schilder*, 340 U. S. 128, this is so neither because of "comity," nor the sanctity of the Executive Branch, but because of a concern for the effect of judicial intervention on morale and military discipline, and because of the civilian judiciary's general unfamiliarity with "extremely technical provisions of the Uniform Code [of Military Justice] which have no analogs in civilian jurisprudence," *Noyd* v. *Bond*, *supra*, at 696.

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[3] As Irving Brant says in the Bill of Rights 483 (1965), "the essential differences between state and federal criminal law, though immense in subject matter, have little bearing on 'fundamental fairness' or 'basic liberties.' These are involved when overlapping jurisdictions produce double jeopardy, but the fundamentals of fairness are not different in state and federal courts."

The "special expertise" argument is often employed by the defenders of the military court system. Thus, the argument was advanced—and rejected—that the civilian judges who were to staff the Court of Military Appeals could not do service, absent military experience, to the complicated, technical niceties of military law.[4] See,

[4] Many of today's critics of the Court of Military Appeals feel that an insensitivity to military needs is the least of the court's problems. Recent attacks have rested on the premise that, in fact, the court has become too closely identified with the viewpoint of the military establishment it is supposed to oversee. See, *e. g.*, R. Sherrill, Military Justice Is to Justice as Military Music Is to Music 214–215 (1970). Critics must concede, however, that the court has at least been partially successful in infusing civilian notions of due process into the military justice system. See, *e. g.*, E. Sherman, Justice in the Military, in Conscience and Command 21, 28 (J. Finn ed. 1971). Thus, the court has extended to servicemen the right to a speedy trial, *United States* v. *Schalck*, 14 U. S. C. M. A. 371, 34 C. M. R. 151; the right to confront witnesses, *United States* v. *Jacoby*, 11 U. S. C. M. A. 428, 29 C. M. R. 244; the right to protection against unreasonable searches and seizures, *United States* v. *Vierra*, 14 U. S. C. M. A. 48, 33 C. M. R. 260; the privilege against self-incrimination, *United States* v. *Kemp*, 13 U. S. C. M. A. 89, 32 C. M. R. 89; the right to a public trial, *United States* v. *Brown*, 7 U. S. C. M. A. 251, 22 C. M. R. 41; the right to compulsory service of process, *United States* v. *Sweeney*, 14 U. S. C. M. A. 599, 34 C. M. R. 379; and the right to *Miranda*-type warnings, *United States* v. *Tempia*, 16 U. S. C. M. A. 629, 37 C. M. R. 249.

Despite these advances, however, the military justice system's disregard of the constitutional rights of servicemen is pervasive. See Hearings on Constitutional Rights of Military Personnel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, pursuant to S. Res. No. 260, 87th Cong., 2d Sess.; Joint Hearings on S. 745 et al. before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary and a Special Subcommittee of the Senate Armed Services Committee, 89th Cong., 2d Sess., pts. 1 and 2. See also Summary-Report of Hearings on Constitutional Rights of Military Personnel, by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, pursuant to S. Res. No. 58, 88th Cong., 1st Sess. (Comm. Print 1963).

e. g., 96 Cong. Rec. 1305–1306. But civilian courts must deal with equally arcane matters in such areas as patent, admiralty, tax, antitrust, and bankruptcy law, on a daily basis.

Our system of specialized military courts, though "necessary to an effective national defense establishment," *O'Callahan* v. *Parker*, 395 U. S., at 265, has roots in a system almost alien to the system of justice provided by the Bill of Rights, by Art. III, and by the special provision for habeas corpus contained in Art. I, § 9. Military law is primarily an instrument of discipline and a "military trial is marked by the age-old manifest destiny of retributive justice." *Id.*, at 266.[5] For the sake of discipline and orderliness a person in the military service must normally follow the military administrative procedure and exhaust its requirements. *Gusik* v. *Schilder*, 340 U. S. 128. But once those administrative remedies are exhausted, he must then be permitted to resort to civilian courts [6] to make sure that the military regime acts

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[5] At the hearings on the proposed Uniform Code of Military Justice, one witness analogized the military court-martial panel to a jury appointed by the sheriff's office. Hearings on the Uniform Code of Military Justice before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., 630 (1949). Rep. Sutton of Tennessee, himself a much-decorated veteran, summarized his views on the state of military justice during World War II by his statement, during the floor debates on the proposed Code, that "[h]ad they used the Pentagon Building for what it was designed, a veteran's hospital, America would have been lots better off today." 95 Cong. Rec. 5727.

[6] The Federal Rules of Civil Procedure govern habeas corpus (Rule 81 (a)(2)), that remedy being civil in nature; and those Rules are comprehensive, including depositions and discovery. Rules 26–37.

The Rules of Practice and Procedure of the Court of Military Appeals (see the Rules ff. 10 U. S. C. A. § 867, Supp. 1972) contain no provisions respecting habeas corpus.

While collateral remedies have been recognized by the Court of Military Appeals since 1966, *United States* v. *Frischholz*, 16 U. S. C. M. A. 150, 36 C. M. R. 306, and the express power to grant habeas

within the scope of statutes governing the problem and any constitutional requirements. To repeat, both statutes [7] and the Constitution [8] are implicated in the claims of conscientious objectors.

Petitioner claims to be a conscientious objector and therefore not subject to military orders. He was charged with refusing to obey a military order sending him to Vietnam and has been convicted of that offense. While the court-martial charges against him were pending, he exhausted all administrative remedies for relief from the Army's denial of his conscientious objector application. In theory he could pursue his remedies within the military system by appealing the conviction or seeking habeas corpus in the Court of Military Appeals. But he need go no further than to exhaust his administrative remedies for overruling the decision that he was not a conscientious objector. If there is a statutory or constitutional reason why he should not obey the order of the Army, that agency is overreaching when it punishes him for his refusal.

The Army has a separate discipline of its own and obviously it fills a special need. But matters of the mind and spirit, rooted in the First Amendment, are not in the

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corpus relief was asserted in 1967, *Levy* v. *Resor*, 17 U. S. C. M. A. 135, 37 C. M. R. 399, the military prisoner is at a substantial disadvantage compared to his civilian counterpart. See Uniform Code of Military Justice, Arts. 32, 36, 46, and 49, 10 U. S. C. §§ 832, 836, 846, and 849. See Melnick, The Defendant's Right to Obtain Evidence: An Examination of the Military Viewpoint, 29 Mil. L. Rev. 1 (1965). See generally M. Comisky & L. Apothaker, Criminal Procedure in the United States District and Military Courts (1963). And see Manual for Courts-Martial, ¶¶ 30f, 34, 115, 117, and 145a (1968).

[7] 50 U. S. C. App. § 456 (j). See *United States* v. *Seeger*, 380 U. S. 163.

[8] See *Gillette* v. *United States*, 401 U. S. 437, 463 (DOUGLAS, J., dissenting).

keeping of the military. Civil liberty and the military regime have an "antagonism" that is "irreconcilable." *Ex parte Milligan,* 4 Wall., at 124, 125. When the military steps over those bounds, it leaves the area of its expertise and forsakes its domain.[9] The matter then becomes one for civilian courts to resolve, consistent with the statutes and with the Constitution.

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[9] Another factor militating against the Court's reliance on "comity" in analyzing the insulation of the military justice system from civilian review is the enormous power of the military in modern American life.

"From an initial authorized strength of well under one thousand, our army alone has grown into a behemoth numbering well over a million men even in time of nominal peace. No longer does the military lie dormant and unnoticed for years on end, coming to the attention of the typical citizen only in time of war. Today every male resident is a potential soldier, sailor, or airman; and it has been estimated that even in time of peace such service occupies at least four percent of the adult life of the average American reaching draft age. As Mr. Chief Justice Warren recently observed:

" 'When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.' [Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 188.]"

Comment, God, the Army, and Judicial Review: The In-Service Conscientious Objector, 56 Calif. L. Rev. 379, 446–447.

LINDSEY ET AL. *v.* NORMET ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. 70–5045. Argued November 15, 1971—
Decided February 23, 1972

Appellants, month-to-month tenants of appellee Normet, refused to pay their monthly rent unless certain substandard conditions were remedied, and appellee threatened eviction. Appellants filed a class action seeking a declaratory judgment that the Oregon Forcible Entry and Wrongful Detainer (FED) Statute was unconstitutional on its face, and an injunction against its continued enforcement. Appellants attacked principally (1) the requirement of trial no later than six days after service of the complaint unless security for accruing rent is provided, (2) the limitation of triable issues to the tenant's default, defenses based on the landlord's breach of duty to maintain the premises being precluded, and (3) the requirement of posting bond on appeal, with two sureties, in twice the amount of rent expected to accrue pending appellate decision, this bond to be forfeited if the lower court decision is affirmed. The District Court granted the motion to dismiss the complaint, concluding that the statute did not violate the Due Process or the Equal Protection Clause. *Held:*

1. Neither the early-trial provision nor the limitation on litigable issues is invalid on its face under the Due Process Clause of the Fourteenth Amendment. Pp. 64–69.

(a) The time for trial preparation is not unduly short where the issue is simply whether the tenant has paid or has held over, and the requirement for rent security for a continuance of the action is not irrational or oppressive. Pp. 64–65.

(b) Appellants are not denied due process because rental payments are not suspended while the alleged wrongdoings of the landlord are litigated, as Oregon may treat the tenant's undertakings and those of the landlord as independent covenants. P. 68.

(c) Appellants are not foreclosed from instituting suit against the landlord and litigating their right to damages and other relief in that action, nor have they shown that Oregon excludes any "available" defenses on the limited questions at issue in an FED suit. Pp. 65–66, 69.

2. Neither the early-trial provision nor the limitation on litigable issues is invalid on its face under the Equal Protection Clause. Pp. 69–74.

(a) The State has the power to implement its legitimate objective of achieving rapid and peaceful settlement of possessory disputes between landlord and tenant by enacting special provisions applicable only to such disputes. Pp. 70–73.

(b) Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships is a legislative function. P. 74.

3. The double-bond prerequisite for appealing an FED action does violate the Equal Protection Clause as it arbitrarily discriminates against tenants wishing to appeal from adverse FED decisions. It heavily burdens the statutory right of an FED defendant to appeal and is not necessary to effectuate the State's purpose of preserving the property at issue. Pp. 74–79.

Affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., *post*, p. 79, and BRENNAN, J., *post*, p. 90, filed opinions dissenting in part. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

John H. Clough argued the cause for appellants. With him on the briefs was *Myron Moskovitz.*

Theodore B. Jensen argued the cause for appellee Normet. With him on the briefs was *Donald J. DeFrancq.*

Briefs of *amici curiae* urging reversal were filed by *Delane C. Carpenter* for the Pima County Bar Assn.; by *Howard W. Dixon, Bruce S. Rogow,* and *Steven Rappaport* for Legal Services of Greater Miami, Inc.; by *Helen S. White* and *Gerald D. McGonigle* for New Hampshire Legal Assistance; by *W. J. Michael Cody III* for Memphis and Shelby County Legal Services Assn., Inc.; by *Elizabeth M. Brooks* for June Brooks; by *Paul L. McKaskle* for Western Center on Law and Poverty; by *Martin R. Glenn* and *John G. O'Mara* for Legal Aid Society of Louisville; by *Andrea M. Alcarese* for Legal

Aid Bureau, Inc.; by *Nancy E. LeBlanc* for Community Action for Legal Services, Inc., et al.; and by *Franklin Arthur Martens* for Allen County Legal Aid Society et al.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents the question of whether Oregon's judicial procedure for eviction of tenants after nonpayment of rent violates either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment.

The material facts were stipulated. Appellants were the month-to-month tenants of appellee Normet [1] and paid $100 a month for the use of a single-family residence in Portland, Oregon. On November 10, 1969, the City Bureau of Buildings declared the dwelling unfit for habitation due to substandard conditions on the premises.[2] Appellants requested appellee to make certain repairs which, with one minor exception, appellee refused to do. Appellants, who had paid the November rent, refused to

[1] The original complaint was filed on behalf of Donald and Edna Lindsey, seven other named plaintiffs (one of whom was an intervenor), and all other persons similarly situated. Permission to maintain the suit as a class action was granted, App. 33, but the class was not further defined. The other named plaintiffs raised claims essentially similar to the Lindseys, who were the only two plaintiffs to appeal and who are hereafter termed "appellants." Appellee Normet was the owner of the seller's interest in the property rented to the appellants and held the legal title to secure the purchaser's performance of the contract of sale. An assignee of the purchaser's interest in the contract had rented the residence to appellants. The trial court found, however, that there was a landlord-tenant relationship between appellee and appellants at the time the suit was filed. App. 71.

[2] It was stipulated that city inspectors found rusted gutters, broken windows, broken plaster, missing rear steps, and improper sanitation, all in violation of the Portland Housing Code, and that the inspectors posted a notice that the dwelling was required to be vacated within 30 days unless the owner could show cause why the building should not be declared unfit for occupancy. App. 43.

pay the December rent until the requested improvements had been made. Appellee's attorney wrote a letter on December 15 threatening to "get a Court Order out on this matter" unless the accrued rent was immediately paid.

On January 7, 1970, however, before statutory eviction procedures were begun in the Oregon courts, appellants filed suit in federal district court under 42 U. S. C. § 1983 seeking a declaratory judgment that the Oregon Forcible Entry and Wrongful Detainer (hereinafter sometimes FED) Statute, Ore. Rev. Stat. (ORS) §§ 105.105–105.160,[3]

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[3] In its entirety, the Oregon Forcible Entry and Wrongful Detainer Statute provides:

"FORCIBLE ENTRY AND WRONGFUL DETAINER

"105.105 Entry to be lawful and peaceable only. No person shall enter upon any land, tenement or other real property unless the right of entry is given by law. When the right of entry is given by law the entry shall be made in a peaceable manner and without force.

"105.110 Action for forcible entry or wrongful detainer. When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and possession is held by force, the person entitled to the premises may maintain in the county where the property is situated an action to recover the possession thereof in the circuit court, district court or before any justice of the peace of the county.

"105.115 Causes of unlawful holding by force. The following are causes of unlawful holding by force within the meaning of ORS 105.110 and 105.125:

"(1) When the tenant or person in possession of any premises fails or refuses to pay rent within 10 days after it is due under the lease or agreement under which he holds, or to deliver possession of the premises after being in default on payment of rent for 10 days.

"(2) When the lease by its terms has expired and has not been renewed, or when the tenant or person in possession is holding from month to month, or year to year, and remains in possession after notice to quit as provided in ORS 105.120, or is holding contrary to any condition or covenant of the lease or is holding possession without any written lease or agreement.

"105.120 Notice necessary to maintain action in certain cases; waiver of notice; effect of advance payments of rent. (1) An action

was unconstitutional on its face, and an injunction against its continued enforcement. A three-judge court was convened under 28 U. S. C. § 2281, a temporary restraining

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for the recovery of the possession of the premises may be maintained in cases provided in subsection (2) of ORS 105.115, when the notice to terminate the tenancy or to quit has been served upon the tenant or person in possession in the manner prescribed by ORS 91.110 and for the period prescribed by ORS 91.060 to 91.080 before the commencement of the action, unless the leasing or occupation is for the purpose of farming or agriculture, in which case such notice must be served for a period of 90 days before the commencement of the action.

"(2) Any person entering into the possession of real estate under written lease as the tenant of another may, by the terms of his lease, waive the giving of any notice required by this section.

"(3) The service of a notice to quit upon a tenant or person in possession does not authorize an action to be maintained against him for the possession of premises before the expiration of any period for which the tenant or person has paid the rent of the premises in advance.

"105.125 Complaint. In an action pursuant to ORS 105.110 it is sufficient to state in the complaint:

"(1) A description of the premises with convenient certainty;

"(2) That the defendant is in possession of the premises;

"(3) That he entered upon the premises with force or unlawfully holds the premises with force; and

"(4) That the plaintiff is entitled to the possession of the premises.

"105.130 How action conducted. Except as provided in ORS 105.135 to 105.160, an action pursuant to ORS 105.110 shall be conducted in all respects as other actions in courts of this state.

"105.135 Service and return of summons. The summons shall be served and returned as in other actions. The service shall be not less than two or more than four days before the day of trial appointed by the court.

"105.140 Continuance. No continuance shall be granted for a longer period than two days unless the defendant applying therefor gives an undertaking to the adverse party with good and sufficient security, to be approved by the court, conditioned for the payment of the rent that may accrue if judgment is rendered against the defendant.

"105.145 Judgment on trial by court. If the action is tried by

order was issued against the enforcement of the FED Statute, and appellants were ordered to make their rent payments into an escrow account during the pendency of

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the court without a jury, and after hearing the evidence it concludes that the complaint is not true, it shall enter judgment against the plaintiff for costs and disbursements. If the court finds the complaint true or if judgment is rendered by default, it shall render a general judgment against the defendant and in favor of the plaintiff, for restitution of the premises and the costs and disbursements of the action. If the court finds the complaint true in part, it shall render judgment for the restitution of such part only, and the costs and disbursements shall be taxed as the court deems just and equitable.

"105.150 Verdict and judgment on trial by jury. If the action is tried by a jury and they find the complaint true, they shall render a general verdict of guilty against the defendant; if not true, they shall render a general verdict of not guilty; if true in part, they shall render a verdict setting forth the facts they find, and the court shall render judgment according to the verdict.

"105.155 Form of execution. The execution, should judgment of restitution be rendered, may be in the following form:

State of Oregon, }
County of ——— } ss.

To the sheriff or any constable of the county:

Whereas, a certain action for the forcible entry and detention, (or the forcible detention) of the following described premises, to wit: ———————, lately tried before the above entitled court, wherein ———— was plaintiff and ———— was defendant, judgment was rendered on the —— day of ——, A. D., ——, that the plaintiff ———— have restitution of the premises, and also that he recover the costs and disbursements in the sum of $———;

In the name of the State of Oregon, you are, therefore, hereby commanded to cause the defendant and his goods and chattels to be forthwith removed from the premises and the plaintiff is to have restitution of the same. In the event the goods and chattels are not promptly removed thereafter by the defendant you are authorized and empowered to cause the same to be removed to a safe place for storage. You are also commanded to levy on the goods and

the District Court proceeding. A lengthy stipulation of facts was agreed upon, a number of exhibits and depositions were submitted, and the District Court then granted appellee's motion to dismiss the complaint,[4] after concluding that the statute was not unconstitutional under either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.[5] Appel-

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chattels of the defendant, and make the costs and disbursements, aforesaid, and all accruing costs, and to make legal service and due return of this writ.

Witness my hand and official seal (if issued out of a court of record) this —— day of ——, A. D., ——.

Justice of the peace, or clerk of the district or circuit court.

"105.160 Additional undertaking on appeal. If judgment is rendered against the defendant for the restitution of the real property described in the complaint, or any part thereof, no appeal shall be taken by the defendant from the judgment until he gives, in addition to the undertaking now required by law upon appeal, an undertaking to the adverse party, with two sureties, who shall justify in like manner as bail upon arrest, for the payment to the plaintiff if the judgment is affirmed on appeal of twice the rental value of the real property of which restitution is adjudged from the commencement of the action in which the judgment was rendered until final judgment in the action."

[4] Civ. No. 70–8, Sept. 10, 1970, D. Ore. (unreported). Reprinted at App. 72.

[5] The District Court correctly declined to abstain from considering the constitutionality of the FED Statute since: "The challenged statute is clear. It is unlikely that an application of state law would change the posture of the federal constitutional issues. No state administrative process is involved. The case has been thoroughly briefed and argued on the merits, and is presented on a clear and complete record." App. 73. Since the judicially created doctrine of abstention involves duplication of effort and expense and an attendant delay, see *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 418 (1964), this Court has emphasized that it should be applied only "where the issue of state law is un-

lants promptly appealed, and we noted probable jurisdiction.[6]

I

The Oregon Forcible Entry and Wrongful Detainer Statute establishes a procedure intended to insure that any entry upon real property "shall be made in a peaceable manner and without force." § 105.105. A landlord may bring an action for possession whenever the tenant has failed to pay rent within 10 days of its due date, when the tenant is holding contrary to some other covenant in a lease, and whenever the landlord has terminated the rental arrangement by proper notice and the tenant remains in possession after the expiration date specified in the notice. § 105.115. Service of the complaint on the tenant must be not less than two nor more than four days before the trial date, § 105.135; a tenant may obtain a two-day continuance, but grant of a longer continuance is conditioned on a tenant's posting security for the payment of any rent that may accrue, if the plaintiff ultimately prevails, during the period of the continuance. § 105.140. The suit may be tried to either a judge or a jury, and the only issue is whether the allegations of the complaint are true, §§ 105.145, 105.150. The only award that a plaintiff may recover is restitution of possession. § 105.155. A defendant who loses such a suit may appeal only if he obtains two sureties who will provide security for the payment to the plaintiff, if the defendant ultimately loses on appeal, of twice the

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certain," *Harman* v. *Forssenius*, 380 U. S. 528, 534 (1965), and "only in narrowly limited 'special circumstances,'" *Zwickler* v. *Koota*, 389 U. S. 241, 248 (1967) (citing *Propper* v. *Clark*, 337 U. S. 472, 492 (1949)). See *Reetz* v. *Bozanich*, 397 U. S. 82 (1970). The Oregon FED Statute had been in effect for over 100 years, and there is a substantial body of interpretative decisions by the Oregon courts.

[6] 402 U. S. 941 (1971).

rental value of the property from the time of commencement of the action to final judgment. § 105.160.[7]

Appellants' principal attacks [8] are leveled at three characteristics of the Oregon FED Statute: the requirement of a trial no later than six days after service of the complaint unless security for accruing rent is provided; the provisions of § 105.145 which, either on their face or as construed, are said to limit the triable issues in an FED suit to the tenant's default and to preclude consideration of defenses based on the landlord's breach of a duty to maintain the premises; and the requirement of posting bond on appeal from an adverse decision in twice the amount of the rent expected to accrue pending appellate decision. These provisions are asserted to violate both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Except for the appeal bond requirement (see Part IV, *infra*), we reject these claims.

II

We are unable to conclude that either the early-trial provision or the limitation on litigable issues is invalid on its face under the Due Process Clause of the Fourteenth Amendment. In those recurring cases where the tenant fails to pay rent or holds over after expiration of his tenancy and the issue in the ensuing litigation

[7] If the FED action is initiated in the district court instead of the circuit court, the double bond is required for a trial *de novo* in the circuit court. ORS §§ 46.250, 53.090. Appellants do not, however, contend that there is anything unconstitutional about the District Court trial, except for the claims noted above, and they do not contend that the dual level trial system itself violates their constitutional rights. Brief for Appellants 63.

[8] Appellants make a conclusory argument that allowing a landlord to allege that the tenant is guilty of "unlawful holding by force" is impermissible on grounds of vagueness. Brief for Appellants 58–59. ORS § 105.115 adequately defines this term, however, see n. 3, *supra*, and the District Court properly rejected this argument.

is simply whether he has paid or held over, we cannot declare that the Oregon statute allows an unduly short time for trial preparation. Tenants would appear to have as much access to relevant facts as their landlord, and they can be expected to know the terms of their lease, whether they have paid their rent, whether they are in possession of the premises, and whether they have received a proper notice to quit, if one is necessary. Particularly where, as here, rent has admittedly been deliberately withheld and demand for payment made, claims of prejudice from an early trial date are unpersuasive. The provision for continuance of the action if the tenant posts security for accruing rent means that in cases where tenant defendants, unlike appellants, deny nonpayment of rent and may require more time to prepare for litigation, they will not be forced to trial if they provide for rent payments in the interim. A requirement that the tenant pay or provide for the payment of rent during the continuance of the action is hardly irrational or oppressive. It is customary to pay rent in advance, and the simplicity of the issues in the typical FED action will usually not require extended trial preparation and litigation, thus making the posting of a large security deposit unnecessary. Of course, it is possible for this provision to be applied so as to deprive a tenant of a proper hearing in specific situations, but there is no such showing made here, and possible infirmity in other situations does not render it invalid on its face.[9]

Nor does Oregon deny due process of law by restricting the issues in FED actions to whether the tenant has paid rent and honored the covenants he has assumed, issues that may be fairly and fully litigated under the Oregon procedure. The tenant is barred from raising

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[9] *United States* v. *National Dairy Corp.*, 372 U. S. 29, 32 (1963); *United States* v. *Raines*, 362 U. S. 17, 22 (1960).

claims in the FED action that the landlord has failed to maintain the premises, but the landlord is also barred from claiming back rent or asserting other claims against the tenant.[10] The tenant is not foreclosed from instituting his own action against the landlord and litigating his right to damages or other relief in that action.[11]

"Due process requires that there be an opportunity to present every available defense." *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 168 (1932). See also *Nickey* v. *Mississippi,* 292 U. S. 393, 396 (1934). Appellants do not deny, however, that there are available procedures to litigate any claims against the landlord cognizable in Oregon. Their claim is that they are denied due process of law because the rental payments are not suspended while the alleged wrongdoings of the landlord are litigated.[12] We see no constitutional barrier to Ore-

[10] ORS § 16.220 (1)(i) provides that when a plaintiff joins an FED action with an action for rental due, "the defendant shall have the same time to answer, or otherwise plead, as is now provided by law in actions for the recovery of rental due." ORS § 91.220 provides that accrued rent may be recovered in an "action at law" which is subject to the general rules of pleading and procedure enumerated in § 16.010 and not the special FED procedures.

[11] Oregon also recognizes certain equitable defenses in FED actions, see *Leathers* v. *Peterson,* 195 Ore. 62, 244 P. 2d 619 (1952) (mental incompetence); *Crossen* v. *Campbell,* 102 Ore. 666, 202 P. 745 (1921) (forfeiture of lease); *Friedenthal* v. *Thompson,* 146 Ore. 640, 31 P. 2d 643 (1934) (reformation of lease); *Menefee Lumber Co.* v. *Abrams,* 138 Ore. 263, 5 P. 2d 709 (1931) (lessor's breach of dependent covenant not to rent another part of premises to business competitive with lessee—tried by stipulation), and ORS § 16.460 provides that when an equitable matter is interposed, the FED action will be stayed until the equitable matters are determined. Apparently, however, the defenses sought to be raised by appellants are not in this category.

[12] This claim is explicitly presented in the complaint: "For their cause of action, said Plaintiffs set forth the following: . . . (c) That said Defendant-Landlords have a duty to refrain from taking retali-

gon's insistence that the tenant provide for accruing rent pending judicial settlement of his disputes with the lessor.[13]

The Court has twice held that it is permissible to segregate an action for possession of property from other actions arising out of the same factual situation that may assert valid legal or equitable defenses or counterclaims. In *Grant Timber & Mfg. Co.* v. *Gray*, 236 U. S. 133 (1915) (Holmes, J.), the Court upheld against due process attack a Louisiana procedure that provided that a defendant sued in a possessory action for real property could not bring an action to establish title or present equitable claims until after the possessory suit was

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atory measures against said Plaintiffs as a result of this action or as a result of reporting Housing Code violations or as a result of Plaintiffs withholding rent to compel the Defendant-Landlords to repair the premises." App. 24. Appellants stipulated that, if permitted, they would raise various legal and equitable defenses (unconstitutionality of the proceeding, illegality of contract, failure of consideration, warranty of fitness of habitability, unclean hands of landlord) if an FED action were brought against them. App. 44. It is sufficiently clear from the District Court's pretrial order that all of the parties, including the defendant state court judge, agreed that the defenses appellants desired to press were unavailable in Oregon FED actions. The District Court agreed that this accurately reflected Oregon law. In these circumstances, therefore, there was no reason for the District Court to abstain. See n. 5, *supra*.

[13] At oral argument, appellants conceded that if a tenant remained in possession without paying rent, a landlord might be deprived of property without due process of law:

"Q: If you didn't have that deposit in escrow [rent paid by tenants during litigation], might you not be confronted with a counter-suggestion that this is a taking of property without due process, without compensation?

"Mr. Clough: Of course; that is correct.

"Q: But you would accept that as an invariable condition to maintaining possession?

"Mr. Clough: Yes, we'd have no problem with that." Tr. of Oral Arg. 14.

brought to a conclusion.[14] In *Bianchi* v. *Morales*, 262 U. S. 170 (1923) (Holmes, J.), the Court considered Puerto Rico's mortgage law which provided for summary foreclosure of a mortgage without allowing any defense except payment. The Court concluded that it was permissible under the Due Process Clause to "exclude all claims of ultimate right from possessory actions," *id.*, at 171, and to allow other equitable defenses to be set up in a separate action to annul the mortgage.

Underlying appellants' claim is the assumption that they are denied due process of law unless Oregon recognizes the failure of the landlord to maintain the premises as an operative defense to the possessory FED action and as an adequate excuse for nonpayment of rent. The Constitution has not federalized the substantive law of landlord-tenant relations, however, and we see nothing to forbid Oregon from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants. Likewise, the Constitution does not authorize us to require that the term of an otherwise expired tenancy be extended while the tenant's damage claims against the landlord are litigated. The substantive law of landlord-tenant relations differs

[14] "It would be a surprising extension of the Fourteenth Amendment if it were held to prohibit the continuance of one of the most universal and best known distinctions of the mediaeval law. From the *exceptio spolii* of the Pseudo-Isidore the Canon Law and Bracton to the assize of novel disseisin the principle was of very wide application that a wrongful disturbance of possession must be righted before a claim of title would be listened to—or at least that in a proceeding to right such disturbance a claim of title could not be set up; and from Kant to Ihering there has been much philosophising as to the grounds. But it is unnecessary to follow the speculations or to consider whether the principle is eternal or a no longer useful survival. The constitutionality of the law is independent of our views upon such points." *Grant Timber & Mfg. Co.* v. *Gray*, 236 U. S. 133, 134 (1915).

widely in the various States. In some jurisdictions, a tenant may argue as a defense to eviction for nonpayment of rent such claims as unrepaired building code violations, breach of an implied warranty of habitability, or the fact that the landlord is evicting him for reporting building code violations or for exercising constitutional rights.[15] Some States have enacted statutes authorizing rent withholding in certain situations.[16] In other jurisdictions, these claims, if cognizable at all, must be litigated in separate tort, contract, or civil rights suits. There is no showing that Oregon excludes any defenses it recognizes as "available" on the three questions (physical possession, forcible withholding, legal right to possession) at issue in an FED suit.

III

We also cannot agree that the FED Statute is invalid on its face under the Equal Protection Clause. It is true that Oregon FED suits differ substantially from other

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[15] For various tenant remedies for housing code violations, see N. Y. Real Prop. Actions Law §§ 769–782 (Supp. 1971–1972); *Brown* v. *Southall Realty Co.*, 237 A. 2d 834 (D. C. Ct. App. 1968); S. D. Comp. Laws Ann. § 43–32–9 (1967). For recognition of an implied warranty of habitability, see *Pines* v. *Perssion*, 14 Wis. 2d 590, 111 N. W. 2d 409 (1961); *Earl Millikin, Inc.* v. *Allen*, 21 Wis. 2d 497, 124 N. W. 2d 651 (1963); Cal. Civ. Code § 1941 (1954 and Supp. 1971). For prohibitions against various kinds of retaliatory evictions, see Ill. Rev. Stat., c. 80, § 71 (1971); Mich. Comp. Laws § 564.204, added by Pub. Acts 1968, c. 2, Mich. Stat. Ann. § 26.1300 (204) (1970); *Edwards* v. *Habib*, 130 U. S. App. D. C. 126, 397 F. 2d 687 (1968), cert. denied, 393 U. S. 1016 (1969); *United States* v. *Bruce*, 353 F. 2d 474 (CA5 1965); *United States* v. *Beaty*, 288 F. 2d 653 (CA6 1961).

[16] N. Y. Mult. Resid. Law § 305–a (Supp. 1971–1972); Ill. Rev. Stat., c. 23, § 11–23 (1971); Mass. Gen. Laws Ann., c. 239, § 8A (Supp. 1971); Pa. Stat. Ann., Tit. 35, § 1700–1 (Supp. 1971). See generally Comment, Rent Withholding and the Improvement of Substandard Housing, 53 Calif. L. Rev. 304 (1965).

litigation, where the time between complaint and trial is substantially longer,[17] and where a broader range of issues may be considered. But it does not follow that the Oregon statute invidiously discriminates against defendants in FED actions.

The statute potentially applies to all tenants, rich and poor, commercial and noncommercial; it cannot be faulted for over-exclusiveness or under-exclusiveness. And classifying tenants of real property differently from other tenants for purposes of possessory actions will offend the equal protection safeguard "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective," *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961), or if the objective itself is beyond the State's power to achieve, *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *NAACP* v. *Alabama*, 377 U. S. 288 (1964); *Douglas* v. *California*, 372 U. S. 353 (1963). It is readily apparent that prompt as well as peaceful resolution of disputes over the right to possession of real property is the end sought by the Oregon statute.[18] It is also clear that the provisions for early trial and simplification of issues are closely related to that purpose. The equal protection claim with respect to these pro-

[17] An FED defendant has from two to six days between the serving of the complaint and trial unless he files a continuance bond. See §§ 105.135, 105.140, n. 3, *supra*.

[18] The statute itself declares the public policy of the State of Oregon to be that: "No person shall enter upon any land, tenement or other real property unless the right of entry is given by law. When the right of entry is given by law the entry shall be made in a peaceable manner and without force." § 105.105. One out of actual possession of real property, although lawfully entitled to such possession, is liable criminally for assault and battery if, instead of filing an FED action, he accomplishes an entry upon such real property by the exertion of force against the person of an actual occupant who opposes and resists such entry. *Coghlan* v. *Miller*, 106 Ore. 46, 54–56, 211 P. 163, 166–167 (1922).

visions thus depends on whether the State may validly single out possessory disputes between landlord and tenant for especially prompt judicial settlement. In making such an inquiry a State is "presumed to have acted within [its] constitutional power despite the fact that, in practice, [its] laws result in some inequality." *McGowan* v. *Maryland, supra,* at 425–426.

At common law, one with the right to possession could bring an action for ejectment, a "relatively slow, fairly complex, and substantially expensive procedure." [19] But, as Oregon cases have recognized, the common law also permitted the landlord to "enter and expel the tenant by force, without being liable to an action of tort for damages, either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary, and do[es] no wanton damage." *Smith* v. *Reeder,* 21 Ore. 541, 546, 28 P. 890, 891 (1892). The landlord-tenant relationship was one of the few areas where the right to self-help was recognized by the common law of most States, and the implementation of this right has been fraught with "violence and quarrels and bloodshed." *Entelman* v. *Hagood,* 95 Ga. 390, 392, 22 S. E. 545 (1895).[20] An alternative legal remedy to prevent such breaches of the peace has appeared to be an overriding necessity to many legislators and judges.

Hence, the Oregon statute was enacted in 1866 to alter the common law and obviate resort to self-help and violence. The statute, intended to protect tenants as well as landlords, provided a speedy, judicially super-

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[19] A. Casner & W. Leach, Cases and Text on Property 451 (2d ed. 1969).

[20] See Annot., Right of Landlord to Dispossess Tenant Without Legal Process, 45 A. L. R. 313 (1926), 49 A. L. R. 517 (1927), 60 A. L. R. 280 (1929), 101 A. L. R. 476 (1936), 6 A. L. R. 3d 177 (1966).

vised proceeding to settle the possessory issue in a peaceful manner:

> "But if [the landlord] forcibly enter and expel the tenant, while he may not be liable to him in an action of tort, he is guilty of a violation of the forcible entry and detainer act, which is designed to protect the public peace; and in such case the law will award restitution to the tenant, not because it recognizes any rights in him, but for the reason that out of regard for the peace and good order of society it does not permit a person in the quiet and peaceable possession of land to be disturbed by force, even by one lawfully entitled to the possession." *Smith* v. *Reeder*, 21 Ore., at 546–547, 28 P., at 891.

Before a tenant is forcibly evicted from property the Oregon statute requires a judicial determination that he is not legally entitled to possession. "The action of forcible entry and detainer is intended for the benefit of him whose possession is invaded." *Taylor* v. *Scott*, 10 Ore. 483, 485 (1883). The objective of achieving rapid and peaceful settlement of possessory disputes between landlord and tenant has ample historical explanation and support. It is not beyond the State's power to implement that purpose by enacting special provisions applicable only to possessory disputes between landlord and tenant.

There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the

landlord continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property. Holding over by the tenant beyond the term of his agreement or holding without payment of rent has proved a virulent source of friction and dispute. We think Oregon was well within its constitutional powers in providing for rapid and peaceful settlement of these disputes.

Appellants argue, however, that a more stringent standard than mere rationality should be applied both to the challenged classification and its stated purpose. They contend that the "need for decent shelter" and the "right to retain peaceful possession of one's home" are fundamental interests which are particularly important to the poor and which may be trenched upon only after the State demonstrates some superior interest. They invoke those cases holding that certain classifications based on unalterable traits such as race [21] and lineage [22] are inherently suspect and must be justified by some "overriding statutory purpose." They also rely on cases where classifications burdening or infringing constitutionally protected rights were required to be justified as "necessary to promote a compelling governmental interest." [23]

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[21] *McLaughlin* v. *Florida*, 379 U. S. 184 (1964); *Loving* v. *Virginia*, 388 U. S. 1 (1967).

[22] *Korematsu* v. *United States*, 323 U. S. 214 (1944); *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410 (1948); *Oyama* v. *California*, 332 U. S. 633 (1948); *Levy* v. *Louisiana*, 391 U. S. 68 (1968); *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U. S. 73 (1968).

[23] *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969) (emphasis omitted) (right to travel). See also *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 668 (1966) (right to vote). Cf. *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942).

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.

Since the purpose of the Oregon Forcible Entry and Wrongful Detainer Statute is constitutionally permissible and since the classification under attack is rationally related to that purpose, the statute is not repugnant to the Equal Protection Clause of the Fourteenth Amendment.

IV

We agree with appellants, however, that the double-bond prerequisite for appealing an FED action violates their right to the equal protection of the laws. To appeal a civil case in Oregon, the ordinary litigant must file an undertaking, with one or more sureties, covering "all damages, costs and disbursements which may be awarded against him on the appeal." ORS § 19.040.[24] In order to secure a stay of execution, the undertaking, where the judgment is for money, must also provide that the appel-

[24] The Oregon civil appeal bond statute provides:

"19.040 Form of undertaking on appeal; conditions for stay of proceedings; enforcement against sureties on dismissal of appeal. (1) The undertaking of the appellant shall be given with one or more sureties, to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal;

lant will satisfy the judgment if he loses the appeal or, if the judgment is for real property, that he will commit no waste during the pendency of the appeal and, if he loses the appeal, that he will pay for the use of the property during this time. In an FED action, however, a defendant who loses in the district court and who wishes to appeal must give "*in addition to* the undertaking now required by law upon appeal," an undertaking with two sureties for the payment of twice the rental value of

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but such undertaking does not stay the proceedings, unless the undertaking further provides to the effect following:

. . . . .

"(b) If the judgment or decree appealed from is for the recovery of the possession of real property, for a partition thereof, or the foreclosure of a lien thereon, that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if such judgment or decree or any part thereof is affirmed, the appellant will pay the value of the use and occupation of such property, so far as affirmed, from the time of the appeal until the delivery of the possession thereof, not exceeding the sum therein specified, to be ascertained and tried by the court or judge thereof.

. . . . .

"(2) When the decree appealed from requires the execution of a conveyance or other instrument, execution of the decree is not stayed by the appeal, unless the instrument is executed and deposited with the clerk within the time allowed to file the undertaking, to abide the decree of the appellate court.

"(3) If the appeal is dismissed, the judgment or decree, so far as it is for the recovery of money, may, by the appellate court, be enforced against the sureties in the undertaking for a stay of proceedings, as if they were parties to the judgment or decree."

An FED action may be brought in the circuit court, the district court, or before a justice of the peace. ORS § 19.040 by its terms applies to appeals from the circuit court to the court of appeals and to the Supreme Court, but if the FED action is initiated in a district court or a justice's court, ORS § 53.040 requires that an appellant to the circuit court give an undertaking with one or more sureties that he will pay "all costs and disbursements that may be awarded against him on the appeal."

the premises "from the commencement of the action in which the judgment was rendered until final judgment in the action." ORS § 105.160. (Emphasis added.) In the event the judgment is affirmed, the landlord is automatically entitled to twice the rents accruing during the appeal without proof of actual damage in that amount. See *Priester* v. *Thrall,* 229 Ore. 184, 187, 349 P. 2d 866, 868 (1960). In *Scales* v. *Spencer,* 246 Ore. 111, 113–114, 424 P. 2d 242, 243 (1967), the Oregon Supreme Court explained the rationale of the double-bond requirement:

> "Inasmuch as a final judgment for restitution could not include a judgment for rent pending appeal it appears obvious that the legislative purpose for requiring this particular bond on appeal was to guarantee that the rent pending an appeal would be paid. That the bond must provide for double the rental value was, no doubt, intended to prevent frivolous appeals for the purpose of delay. If there were not some added cost or restriction every ousted tenant would appeal, regardless of the justification. It can also be assumed that the additional payment would compensate for waste or is in lieu of damages for the unlawful holding over."

We have earlier said that Oregon may validly make special provision for the peaceful and expeditious settlement of disputes over possession between landlord and tenant and that the early-trial and continuance bond provisions of the FED statute rationally implement that purpose because the tenant's right to possession beyond the initial six-day period is conditioned on securing the landlord against the loss of accruing rent. Similar conditions on the tenant's right to appeal, such as those imposed by § 19.040, would also raise no serious constitutional questions, at least on the face of such a statute. Section 105.160, however, imposes additional requirements that in our judgment bear no reasonable relation-

ship to any valid state objective and that arbitrarily discriminate against tenants appealing from adverse decisions in FED actions.

This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review, *Griffin* v. *Illinois,* 351 U. S. 12, 18 (1956); *District of Columbia* v. *Clawans,* 300 U. S. 617, 627 (1937); *Ohio* v. *Akron Park District,* 281 U. S. 74, 80 (1930); *Reetz* v. *Michigan,* 188 U. S. 505, 508 (1903); *McKane* v. *Durston,* 153 U. S. 684, 687–688 (1894), and the continuing validity of these cases is not at issue here. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Griffin* v. *Illinois, supra; Smith* v. *Bennett,* 365 U. S. 708 (1961); *Lane* v. *Brown,* 372 U. S. 477 (1963); *Long* v. *District Court of Iowa,* 385 U. S. 192 (1966); *Gardner* v. *California,* 393 U. S. 367 (1969). Cf. *Coppedge* v. *United States,* 369 U. S. 438 (1962); *Ellis* v. *United States,* 356 U. S. 674 (1958).

It cannot be denied that the double-bond requirement heavily burdens the statutory right of an FED defendant to appeal. While a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession, the double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord. This requirement is unnecessary to assure the landlord payment of accrued rent since the undertaking an FED defendant must file pursuant to the general appeal bond statute, ORS § 19.040 (b), must cover "the value of the use and occupation of such property . . . from the time of the appeal until the delivery of the possession thereof,"

and since the landlord may bring a separate action at law for payment of back rent under ORS § 91.220.[25] Moreover, the landlord is protected against waste or damages occurring during the appeal by the § 19.040 (b) undertaking that the tenant must file if he wishes to remain in possession of the property during the appeal. The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond. The impact on FED appellants is unavoidable: if the lower court decision is affirmed, the entire double bond is forfeited; recovery is not limited to costs incurred by the appellee, rent owed, or damage suffered. No other appellant is subject to automatic assessment of unproved damages. We discern nothing in the special purposes of the FED statute or in the special characteristics of the landlord-tenant relationship to warrant this discrimination.

We do not question here reasonable procedural provisions to safeguard litigated property, cf. *National Union of Marine Cooks & Stewards* v. *Arnold,* 348 U. S. 37 (1954), or to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied. Moreover, a State has broad authority to provide for the recovery of double or treble damages in cases of illegal conduct that it regards as particularly reprehensible, even though posting an appeal bond by an appellant will be doubly or triply more difficult than it otherwise would be. In the case before us, however, the

[25] The § 19.040 (b) undertaking does not, it is true, cover any rent that has accrued from the time the FED action is filed until the time the appeal is taken. However, the § 105.145 continuance bond filed by the tenant if the pretrial delay is over six days provides security for this rent, or such rent may be recovered as back rent in the § 91.220 action at law.

State has not sought to protect a damage award or property an appellee is rightfully entitled to because of a lower court judgment.[26] Instead, it has automatically doubled the stakes when a tenant seeks to appeal an adverse judgment in an FED action. The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. The nonindigent FED appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon. The discrimination against the class of FED appellants is arbitrary and irrational, and the double-bond requirement of ORS § 105.160 violates the Equal Protection Clause.

The judgment of the District Court is

Affirmed in part and reversed in part.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting in part.

I

I agree with the Court that the double-bond provision in the Oregon eviction statute denies tenants who are affected by forcible entry and wrongful detainer pro-

[26] *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949), is distinguishable from the instant case. There, the Court upheld a state law that required a shareholder who wished to file a shareholder's derivative suit but who owned less than 5% of the corporation's stock or whose stock was worth less than $50,000 to file as a precondition to bringing the suit a bond for the reasonable expenses, including attorney's fees, that might be incurred by defendants. The security requirement there applied to a *plaintiff* and its purpose was to protect the corporation from being injured by "strike suits" that harmed the very interests that plaintiffs claimed to be protecting.

cedures (called FED) that equal protection guaranteed against state action by the Fourteenth Amendment.

The ordinary or customary litigant who appeals must file a bond with one or more sureties covering "all damages, costs and disbursements which may be awarded against him on the appeal." [1] To obtain a stay of execution pending the appeal the undertaking must also provide: (1) if the suit is for recovery of money or personal property (or its value), that the appellant will satisfy the claim if he loses the appeal and (2) if the judgment is for the recovery of possession of real property, for a partition or for the foreclosure of a lien, that during possession the appellant will not commit waste and that if he loses the appeal, he will pay the value of the use of the property during the appeal.

By contrast, if a tenant in an FED action appeals, he must give "in addition to the undertaking now required by law upon appeal" [2] an undertaking with two sureties for payment of twice the rental value of the premises from the commencement of the action until final judgment.

The more onerous requirement placed on tenants is said to be a guarantee that rent pending appeal will be paid. *Scales* v. *Spencer*, 246 Ore. 111, 424 P. 2d 242. Yet the general appeal statute would give that protection.[3]

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[1] Ore. Rev. Stat. § 19.040 (1).

[2] *Id.*, § 105.160.

[3] The general appeal statute (Ore. Rev. Stat. § 19.040 (1)), however, applies only to appeals from the trial court of general jurisdiction (circuit court). FED actions may be brought in the circuit court, Ore. Rev. Stat. § 105.110, but are also within the jurisdiction of the district and justice of the peace courts—courts of limited jurisdiction. *Ibid.* A litigant may appeal from these courts to the circuit court, Ore. Rev. Stat. § 46.250, in which case trial is had *de novo*, and may stay an adverse decision pending appeal by giving an undertaking, with one or more sureties, that he will pay all costs and disbursements against him awarded on the appeal, and

It is said that the landlord deserves protection for waste or damages pending appeal. *Ibid.* But that protection is also provided under the general appeal statute.

It is said that a double-rent bond protects the landlord against possible waste or damage which occurs prior to, not during, the appeal. But the same reason would be germane to waste or damage in other suits brought to obtain possession of property. Drawing the line between the present suits to obtain possession and other suits and saddling tenants with double-rent bonds but not saddling other owners with such bonds seems to me obviously an invidious discrimination.

It is said that the double-rent bond is designed to prevent frivolous appeals taken for the sole purpose of delaying eviction as long as possible. *Ibid.* Yet frivolous appeals could as well be taken by defendants whose lien is being foreclosed and who desire to remain in possession. It is an invidious discrimination at which the Equal Protection Clause is aimed for a legislature to select one class of appellants who seek to retain possession of property and place a more onerous condition on their right to appeal than is placed on other like appellants.

In sum, the double-bond procedure is landlord legislation, not evenly weighted between his proprietary interest in the property and the rights of the tenants. Over a third of our population lives in apartments or other rented housing.[4] The home—whether rented or

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that he will satisfy any judgment that might be entered against him by the appellate court. Ore. Rev. Stat. § 53.040.

Appellees argue that the undertaking provided for by Ore. Rev. Stat. § 53.040 is inadequate to protect landlords' rights. The answers are two. First, the landlord has the prerogative to bring suit in the circuit court, should he desire the greater protection of the general appeal statute. Second, the legislature could provide that the general appeal statute apply to FED actions brought in the district, as well as circuit, courts.

[4] 1970 Census of Housing, Advance Report HC (V. 1), p. 11.

owned—is the very heart of privacy in modern America. MR. JUSTICE MARSHALL in *Hall* v. *Beals*, 396 U. S. 45, 52 (dissenting), spoke of the protection afforded "fundamental interests" when it came to classifications made by legislatures. In that case it was the franchise. Race is in the same category (*McLaughlin* v. *Florida*, 379 U. S. 184); so are wealth (*Douglas* v. *California*, 372 U. S. 353; *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663); procreation (*Skinner* v. *Oklahoma*, 316 U. S. 535); and interstate travel (*Shapiro* v. *Thompson*, 394 U. S. 618). Classifications that burden, impinge, or discriminate against such fundamental interests [5] are "highly suspect." *McDonald* v. *Board of Elections*, 394 U. S. 802, 807.

Modern man's place of retreat for quiet and solace is the home. Whether rented or owned, it is his sanctuary. Being uprooted and put into the street is a traumatic experience. Legislatures can, of course, protect property interests of landlords. But when they weight the scales as heavily as does Oregon for the landlord and against the fundamental interest of the tenant they must be backed by some "compelling . . . interest," *Kramer* v. *Union School District*, 395 U. S. 621, 627. No such "compelling . . . interest" underlies this statutory scheme.

The double-rent bond required of tenants, but not required of others in possession of real estate, is properly held to be unconstitutional by reason of the Equal Protection Clause of the Fourteenth Amendment.

II

I cannot agree, however, that the remainder of Oregon's FED Statute satisfies the requirements of due process of law.

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[5] The "rational" relationship test applied to strictly economic or business interests (*United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U. S. 4, 6; *McDonald* v. *Board of Elections*, 394 U. S. 802, 809) is not germane here.

I am satisfied that the Court properly addresses itself to the remaining questions rather than requiring appellants, who are already destitute, to start litigation all over in the Oregon state courts. The three-judge court that decided this case is a panel of distinguished Oregon lawyers and judges. Judge Goodwin came to the District Court from the Supreme Court of Oregon. Judge Solomon has practiced and sat in Portland, Oregon, for years. Judge Kilkenny was a well-known practitioner in Pendleton, Oregon, before coming to the federal bench. These men have their roots deep in Oregon law and are by no means outsiders unfamiliar with it. On local-law questions we have long deferred to federal judges who have come from law practice in a State whose local law is at issue in a federal case. See *MacGregor* v. *State Mutual Co.*, 315 U. S. 280, 281; *Huddleston* v. *Dwyer*, 322 U. S. 232, 237; *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204; *Magenau* v. *Aetna Freight Lines*, 360 U. S. 273, 281 n. 2 (Frankfurter, J., dissenting).

This is a most appropriate occasion to honor that tradition. While there are occasional appropriate cases for abstention (see *Reetz* v. *Bozanich*, 397 U. S. 82), this Court's abstention doctrine that requires litigants to start all over again in a state court after having financed their course all the way to this Court is likely to exhaust only the litigants.

This all-Oregon panel said on the abstention issue:

> "It is unlikely that an application of state law would change the posture of the federal constitutional issues. No state administrative process is involved. The case has been thoroughly briefed and argued on the merits, and is presented on a clear and complete record. It is ripe for decision. Only one appeal (to the United States Supreme Court) will now be needed to settle the federal constitutional question. While the state courts are also capable of

applying the United States Constitution to a challenged state law, two levels of appeal would be needed in an F. E. D. case within the state system. A final state-court decision would still not necessarily settle the federal constitutional question.

"Closely related to the time element is economy. Cases of this sort tax both courts and counsel. Until finally resolved, these cases produce expense, uncertainty, and frustration. Delay produces no balancing benefit, either of comity or of clarity in state-federal relations."

Agreeing with that view, I come to the remaining constitutional issues.

In my view, there are defects in the Oregon procedures which go to the essence of a litigant's right of access to the courts, whether he be rich or poor, black or white.

The problem starts with Judge Wright's statement in *Javins* v. *First National Realty Corp.*, 138 U. S. App. D. C. 369, 372, 428 F. 2d 1071, 1074:

"When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance."

This vital interest that is at stake may, of course, be tested in so-called summary proceedings. But the requirements of due process apply and due process entails the right "to sue and defend in the courts," a right we have described as "the alternative of force" in an organized society. *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 148. In essence the question comes down to notice and an opportunity to defend. *Armstrong* v. *Manzo*, 380 U. S. 545; *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306.

Oregon gives the tenant "not less than two or more than four days" [6] after service of summons to go to trial. If service is on a Friday, trial could be on the following Monday. There can be no continuance for more than two days "unless the defendant . . . gives an undertaking . . . with good and sufficient security" covering the rent which may accrue during the trial.[7]

For slum tenants—not to mention the middle class—this kind of summary procedure usually will mean in actuality no opportunity to be heard. Finding a lawyer in two days, acquainting him with the facts, and getting necessary witnesses make the theoretical opportunity to be heard and interpose a defense a promise of empty words. It is, indeed, a meaningless notice and opportunity to defend. The trial is likely to be held in the presence of only the judge and the landlord and the landlord's attorney.[8]

Moreover, even for tenants who have been lucky to find a lawyer, the landlord need only plead [9] and prove [10] the following items in order to win a judgment: (1) a description of the premises, (2) that the defendant is in possession of the premises, (3) that he entered upon them "with force," or unlawfully holds them "with force," [11] and (4) that the plaintiff is entitled to possession.

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[6] Ore. Rev. Stat. § 105.135.

[7] *Id.*, § 105.140.

[8] The majority stresses the "fact" that a tenant *may* have up to six days to prepare for trial. But as of *right*, the statute guarantees only two. While various discretionary actions may result in a tenant's having the full six days, "[t]he right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." *Roller* v. *Holly*, 176 U. S. 398, 409.

[9] Ore. Rev. Stat. § 105.125.

[10] *Id.*, § 105.145.

[11] "Unlawful holding by force" is defined by Ore. Rev. Stat. § 105.115 to occur in the following circumstances: (1) if a tenant "fails or refuses to pay rent within 10 days after it is due" pursuant to a lease or agreement, (2) if he fails or refuses "to deliver posses-

Affirmative defenses such as the failure of the landlord to make repairs or that the motivation for the eviction was retaliation for a report by the tenant of a violation of a housing code are apparently precluded. This reflects the ancient notion that a lease is a conveyance of an "estate in land," in which the respective covenants—a tenant's to pay rent, the landlord's to repair—were deemed independent of each other. This approach was appropriate in the feudal culture in which property law evolved.[12] But this feudal notion of landlord-tenant law—rooted in the special needs of an agrarian society—has not been a realistic approach to

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sion of the premises after being in default on payment of rent for 10 days," (3) if he remains in possession after receipt of a statutory notice to quit (see Ore. Rev. Stat. § 105.120) and was holding under an expired lease or was a month-to-month or year-to-year tenant, or (4) if he "is holding contrary to any condition or covenant of the lease" or "without any written lease or agreement."

[12] "Under feudal tenure, and in more recent times, in the setting of a largely agrarian society, the tenant rented land primarily for the production of crops. The fact that a building or dwelling stood on the premises was, in the main, incidental, because the major emphasis was on the tenant's right to till the soil for the production of crops to supply him a livelihood. For as long as the tenant rented the land he was the holder of an estate for years; in effect, he was the owner for a limited term. If he wanted to live in comfort, and if a dwelling stood on the land, it was his business to make that dwelling livable, to see to it that the roof was watertight, that the well was in good shape, and that whatever sanitary facilities there were, were adequate. While he was not to commit 'waste'—destruction of the property that would leave it in less productive condition than when he rented it—the owner owed him no obligation to assist in maintaining his buildings in a livable or decent condition.

"If anything, the obligation ran the other way, because an intentional or grossly negligent destruction of buildings on the premises might be construed as waste by the tenant. Thus, from its very beginning, the obligation to repair went hand in hand with control. Since the landlord gave up control over the premises for the stated term of years of the leasehold, during that term whatever the

landlord-tenant law for many years,[13] and has been replaced by what eminent authorities have described as "a predominately contractual" analysis of leasehold interests.[14] This led Judge Wright in *Javins* v. *First National Realty Corp.*, 138 U. S. App. D. C., at 373, 428 F. 2d, at 1075, to hold "that leases of urban dwelling units should be interpreted and construed like any other contract." Oregon takes the same view and treats a lease as a contract. *Wright* v. *Baumann*, 239 Ore. 410, 398 P. 2d 119; *Eggen* v. *Wetterborg*, 193 Ore. 145, 237 P. 2d 970.

The Housing Code of Portland, Oregon, has as its declared purpose the protection of the life, health, and welfare of the public and of the owners and occupants of residential buildings.[15] It forbids anyone to use or permit a building to be used in violation of its provisions. *Id.*, § 8–204.

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obligation to repair would rest on the temporary owner, the tenant, rather than on the holder of the reversionary interest, the owner of the fee. Initially, the dependence of the obligation to repair on the capacity to control was retained and applied to non-rural housing as well." Legal Remedies for Housing Code Violations, National Commission On Urban Problems, Research Report No. 14, pp. 110–111 (1968).

[13] "The legal rules pertaining to the repair of leaseholds became wholly unreal and anachronistic with increasing urbanization during the 19th century, with the increasing reliance on multi-unit rental property, such as tenement houses, to provide shelter for the urban areas' growing industrial labor population. In an agrarian setting it made sense to require the tenant to keep in good repair an entire dwelling house he had rented from an owner. On the other hand, to require a relatively transient tenant to assume the obligation of repair in a multi-unit building or in a tenement house with respect to his rooms and with respect to plumbing, heating, and other fixtures that were interconnected with other parts and fixtures in the building made no sense at all." *Id.*, at 111–112.

[14] R. Powell & P. Rohan, Real Property 179 (1967).

[15] Housing Code § 8–102.

We do not know what Oregon would hold if a lease in violation of a housing code was before it in an FED case. But if the lease is a contract, then the opportunity to be heard would certainly embrace the issue of legality, if due process is to have any real significance. Oregon's statutory FED scheme is plainly to protect landlords against loss of rental income during lengthy litigation. See *Menefee Lumber Co.* v. *Abrams,* 138 Ore. 263, 5 P. 2d 709; *Friedenthal* v. *Thompson,* 146 Ore. 640, 31 P. 2d 643. But that is no justification for denial to tenants of due process, as there are other less drastic devices for protecting the landlord. Judge Wright in the *Javins* case, 138 U. S. App. D. C., at 381 n. 67, 428 F. 2d, at 1083 n. 67, proposed "an excellent protective procedure" in the form of a requirement that the tenant, who raises an affirmative defense based on housing code violations or other discriminatory landlord practices, pay rent into court as it became due.[16] See also *Bell* v. *Tsintolas Realty Co.,* 139 U. S. App. D. C. 101, 430 F. 2d 474. The District Court in the present case employed a similar procedure.

Appellees assert that the affirmative defenses mentioned are not relevant to the issues posed under Oregon's FED Act. They represent to us that the Oregon judges at the trial level have usually held that such defenses are not relevant, though the Oregon Supreme Court has not considered the question. What Oregon will hold or should hold is not the issue. Since, however, Oregon holds that a lease is a contract, all defenses

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[16] Oregon's continuance bond, Ore. Rev. Stat. § 105.140, serves the same function:

"No continuance shall be granted for a longer period than two days unless the defendant applying therefor gives an undertaking to the adverse party with good and sufficient security, to be approved by the court, conditioned for the payment of the rent that may accrue if judgment is rendered against the defendant."

relevant to its legality and its actual operation would seem to be within the ambit of the opportunity to be heard that is embraced within the concept of due process, at least until the issue has been resolved to the contrary.

The Court suggests that landlord-tenant law raises no federal questions. This is not quite so clear to me. We have held that the right to complain to public authorities is constitutionally protected. *In re Quarles*, 158 U. S. 532. If a defendant in an FED action is denied the right to assert as a defense the claim that he is being evicted, not for the nonpayment of rent, but because he exercised his constitutional right to complain to public officials about the disrepair of his apartment, a substantial federal question would be presented. See *Edwards* v. *Habib*, 130 U. S. App. D. C. 126, 129–137, 397 F. 2d 687, 690–698 (1968).

The Court also implies that to find for appellants in this case, we would have to hold, as a matter of constitutional law, that a lease is required to be interpreted as an ordinary contract. But this is not at all necessary. Oregon has already adopted the modern, contractual view of leasehold analysis. The issue that confronts the Court is not whether such a view is constitutionally compelled, but whether, once Oregon has gone this far as a matter of state law, the requirements of due process permit a restriction of contract-type defenses in an FED action. Cf. *Shapiro* v. *Thompson*, 394 U. S., at 627 n. 6; *Sherbert* v. *Verner*, 374 U. S. 398, 404–406.

Normally a State may bifurcate trials, deciding, say, the right to possession in one suit and the right to damages in another. See *Bianchi* v. *Morales*, 262 U. S. 170; *American Surety Co.* v. *Baldwin*, 287 U. S. 156.

But where the right is so fundamental as the tenant's claim to his home, the requirements of due process should be more embracing. In the setting of modern urban

life, the home, even though it be in the slums, is where man's roots are. To put him into the street when the slum landlord, not the slum tenant, is the real culprit deprives the tenant of a fundamental right without any real opportunity to defend. Then he loses the essence of the controversy, being given only empty promises that somehow, somewhere, someone may allow him to litigate the basic question in the case.

Bianchi v. *Morales, supra,* which sanctioned the bifurcated trial in the rural setting of Puerto Rico, where the contest was between mortgagor and mortgagee, would be an insufferable addition to the law of the modern ghetto.

A judgment obtained by the landlord, whether by default or otherwise, gives him the right to levy on the goods of the tenant to recover the costs and disbursements of the suit.[17] Moreover, any past waste or damages, which are covered by the appeal bond, are not an issue in litigation in FED cases. As noted, the issues in Oregon FED cases are limited and the proceedings summary. Making the tenant liable for past waste or damage through the device of an appeal bond when he has no real opportunity to defend is a manifest denial of due process.

I dissent from an affirmance of this judgment.

MR. JUSTICE BRENNAN, dissenting in part.

In my view the District Court erred in declining to apply the doctrine of abstention with respect to the availability of defenses in FED actions.* The issue

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[17] Ore. Rev. Stat. § 105.155.

*Abstention on the double-bond provision is not required in light of the Oregon Supreme Court's decision in *Scales* v. *Spencer,* 246 Ore. 111, 424 P. 2d 242 (1967). I agree with the Court that this provision violates the Equal Protection Clause.

is whether Oregon would violate the Fourteenth Amendment if its substantive law in some circumstances recognized a tenant's rights to withhold rent and retain possession based on the landlord's breach of duty to maintain the premises, but its procedural law would not permit assertion of those rights in defense of an FED action. This constitutional issue is ripe for decision if, and only if, Oregon law (1) recognizes substantive rights of the tenant based on the landlord's breach of duty; (2) recognizes, because of such breach, that a tenant may remain in possession while withholding rent during the term or may hold over after expiration of the term, and (3) excludes the assertion of these rights to continued possession as a defense to an FED action.

The Court's opinion exposes the fallacy of the District Court's conclusion that Oregon law is "clear" and that "[i]t is unlikely that an application of state law would change the posture of the federal constitutional issues." App. 73. For the Court cites Oregon decisions that have recognized certain equitable defenses in FED actions, *ante*, at 66 n. 11, and can only conjecture that the defenses appellants sought to raise are "apparently" not in this category. We cannot confidently say, therefore, how the Oregon courts would treat appellants' defenses, if available at all, when asserted in an FED suit, or how, if those defenses are available in FED suits, the Oregon courts would apply the requirement of a trial no later than six days after service of process. Clearly, therefore, the Oregon law is susceptible of a "construction by the state courts that would avoid or modify the constitutional question." *Zwickler* v. *Koota*, 389 U. S. 241, 249 (1967); *Reetz* v. *Bozanich*, 397 U. S. 82 (1970). In these circumstances the District Court should have remitted appellants to the Oregon courts for an authoritative interpretation of Oregon law in

these respects before adjudicating appellants' plainly nonfrivolous constitutional attacks upon the FED Statute.

I would vacate the judgment of dismissal and remand with direction to the District Court (1) to enter judgment declaring that the double-bond requirement of Ore. Rev. Stat. § 105.160 violates the Equal Protection Clause, and (2) to retain jurisdiction and reinstate the temporary restraining order conditioned on the payment of rent into the escrow account, provided appellants, within a time fixed by the District Court, institute appropriate proceedings in the Oregon courts to obtain an authoritative interpretation of the FED Statute with respect to defenses available in actions thereunder.

UNITED STATES v. GENERES ET VIR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70-28. Argued November 8, 1971—
Decided February 23, 1972

Respondent taxpayer owned 44% of the stock of a closely held construction corporation, with an original investment of $38,900, and received an annual salary of $12,000 for serving as president on a part-time basis. His total income was about $40,000 a year. He advanced money to the corporation and signed an indemnity agreement with a bonding company, which furnished bid and performance bonds for the construction contracts. The corporation defaulted on contracts in 1962 and the taxpayer advanced over $158,000 to the corporation and indemnified the bonding company to the extent of more than $162,000. The corporation went into receivership and he obtained no reimbursement for these sums. On his 1962 income tax return the taxpayer took his loss on direct loans to the corporation as a nonbusiness bad debt, but he claimed the indemnification loss as a business debt and deducted it against ordinary income and asserted net loss carrybacks for the portion unused in 1962, pursuant to 26 U. S. C. § 172. Treasury Regulations provide that if, at the time of worthlessness, the debt has a "proximate" relationship to the taxpayer's business, the debt qualifies as a business bad debt. In his suit for a tax refund the taxpayer testified that his sole motive for signing the indemnification agreement was to protect his $12,000-a-year employment with the corporation. The jury was asked to determine whether signing the agreement "was proximately related to his trade or business of being an employee" of the corporation. The court refused the Government's request for an instruction that the applicable standard was that of *dominant* motivation and charged the jury that *significant* motivation satisfies the Regulations' requirement of proximate relationship. The jury's verdict was for the taxpayer

and the Court of Appeals affirmed, approving the significant-motivation standard. *Held:*

1. In determining whether a bad debt has a "proximate" relation to the taxpayer's trade or business and thus qualifies as a business bad debt, the proper standard is that of dominant motivation rather than significant motivation. Pp. 103–105.

2. There is nothing in the record that would support a jury verdict in the taxpayer's favor had the dominant-motivation standard been embodied in the instructions. Pp. 106–107.

427 F. 2d 279, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART and MARSHALL, JJ., joined and in which (as to Parts I, II, and III) BRENNAN and WHITE, JJ., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 107. WHITE, J., filed a separate opinion, in which BRENNAN, J., joined, *post*, p. 112. DOUGLAS, J., filed a dissenting opinion, *post*, p. 113. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Matthew J. Zinn argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Walters,* and *Ernest J. Brown.*

Max Nathan, Jr., argued the cause and filed a brief for respondents.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

A debt a closely held corporation owed to an indemnifying shareholder-employee became worthless in 1962. The issue in this federal income tax refund suit is whether, for the shareholder-employee, that worthless obligation was a business or a nonbusiness bad debt within the meaning and reach of §§ 166 (a) and (d) of the Internal Revenue Code of 1954, as amended, 26

U. S. C. §§ 166 (a) and (d),[1] and of the implementing Regulations § 1.166–5.[2]

The issue's resolution is important for the taxpayer. If the obligation was a business debt, he may use it to

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[1] "§ 166. Bad debts.

"(a) General rule.—

"(1) Wholly worthless debts.—There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

. . . . . .

"(d) Nonbusiness debts.—

"(1) General rule.—In the case of a taxpayer other than a corporation—

"(A) subsections (a) and (c) shall not apply to any nonbusiness debt; and

"(B) where any nonbusiness debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months.

"(2) Nonbusiness debt defined.—For purposes of paragraph (1), the term 'nonbusiness debt' means a debt other than—

"(A) a debt created or acquired (as the case may be) in connection with a trade or business of the taxpayer; or

"(B) a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business."

[2] Treas. Reg. on Income Tax:

"26 CFR § 1.166–5 Nonbusiness debts.

. . . . . .

"(b) Nonbusiness debt defined. For purposes of section 166 and this section, a nonbusiness debt is any debt other than—

. . . . . .

"(2) A debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business. The question whether a debt is a nonbusiness debt is a question of fact in each particular case. . . . For purposes of subparagraph (2) of this paragraph, the character of the debt is to be determined by the relation which the loss resulting from the debt's becoming worthless bears to the trade or business of the taxpayer. If that relation is a proximate one in the conduct of the trade or business in which the taxpayer is engaged at the time the debt becomes worthless, the debt comes within the exception provided by that subparagraph. . . ."

offset ordinary income and for carryback purposes under § 172 of the Code, 26 U. S. C. § 172. On the other hand, if the obligation is a nonbusiness debt, it is to be treated as a short-term capital loss subject to the restrictions imposed on such losses by § 166 (d)(1)(B) and §§ 1211 and 1212, and its use for carryback purposes is restricted by § 172 (d)(4). The debt is one or the other in its entirety, for the Code does not provide for its allocation in part to business and in part to nonbusiness.

In determining whether a bad debt is a business or a nonbusiness obligation, the Regulations focus on the relation the loss bears to the taxpayer's business. If, at the time of worthlessness, that relation is a "proximate" one, the debt qualifies as a business bad debt and the aforementioned desirable tax consequences then ensue.

The present case turns on the proper measure of the required proximate relation. Does this necessitate a "dominant" business motivation on the part of the taxpayer or is a "significant" motivation sufficient?

Tax in an amount somewhat in excess of $40,000 is involved. The taxpayer, Allen H. Generes,[3] prevailed in a jury trial in the District Court. See 67-2 U. S. T. C. ¶ 9754 (ED La.). On the Government's appeal, the Fifth Circuit affirmed by a divided vote. 427 F. 2d 279 (CA5 1970). Certiorari was granted, 401 U. S. 972 (1971), to resolve a conflict among the circuits.[4]

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[3] Edna Generes, wife of Allen H. Generes, is a named party because joint income tax returns were filed by Mr. and Mrs. Generes for some of the tax years in question.

[4] Compare the decision below and *Weddle* v. *Commissioner*, 325 F. 2d 849 (CA2 1963), with *Niblock* v. *Commissioner*, 417 F. 2d 1185 (CA7 1969). In *Smith* v. *Commissioner*, 55 T. C. 260, 268–271 (1970), reviewed without dissent, the Tax Court felt constrained,

I

The taxpayer as a young man in 1909 began work in the construction business. His son-in-law, William F. Kelly, later engaged independently in similar work. During World War II the two men formed a partnership in which their participation was equal. The enterprise proved successful. In 1954 Kelly-Generes Construction Co., Inc., was organized as the corporate successor to the partnership. It engaged in the heavy-construction business, primarily on public works projects.

The taxpayer and Kelly each owned 44% of the corporation's outstanding capital stock. The taxpayer's original investment in his shares was $38,900. The remaining 12% of the stock was owned by a son of the taxpayer and by another son-in-law. Mr. Generes was president of the corporation and received from it an annual salary of $12,000. Mr. Kelly was executive vice-president and received an annual salary of $15,000.

The taxpayer and Mr. Kelly performed different services for the corporation. Kelly worked full time in the field and was in charge of the day-to-day construction operations. Generes, on the other hand, devoted no more than six to eight hours a week to the enterprise. He reviewed bids and jobs, made cost estimates, sought

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under the policy expressed in *Golsen* v. *Commissioner*, 54 T. C. 742 (1970), aff'd, 445 F. 2d 985 (CA10 1971), to apply the Fifth Circuit test but stated that it agreed with the Seventh Circuit. Cases where the resolution of the issue was avoided include *Stratmore* v. *United States*, 420 F. 2d 461 (CA3 1970), cert. denied, 398 U. S. 951; *Kelly* v. *Patterson*, 331 F. 2d 753, 757 (CA5 1964); and *Gillespie* v. *Commissioner*, 54 T. C. 1025, 1032 (1970). See, also, *Millsap* v. *Commissioner*, 387 F. 2d 420 (CA8 1968). For commentary on the present case, see 3 Sw. U. L. Rev. 135 (1971); 2 Tex. Tech. L. Rev. 318 (1971); and 28 Wash. & Lee L. Rev. 161 (1971).

and obtained bank financing, and assisted in securing the bid and performance bonds that are an essential part of the public-project construction business. Mr. Generes, in addition to being president of the corporation, held a full-time position as president of a savings and loan association he had founded in 1937. He received from the association an annual salary of $19,000. The taxpayer also had other sources of income. His gross income averaged about $40,000 a year during 1959–1962.

Taxpayer Generes from time to time advanced personal funds to the corporation to enable it to complete construction jobs. He also guaranteed loans made to the corporation by banks for the purchase of construction machinery and other equipment. In addition, his presence with respect to the bid and performance bonds is of particular significance. Most of these were obtained from Maryland Casualty Co. That underwriter required the taxpayer and Kelly to sign an indemnity agreement for each bond it issued for the corporation. In 1958, however, in order to eliminate the need for individual indemnity contracts, taxpayer and Kelly signed a blanket agreement with Maryland whereby they agreed to indemnify it, up to a designated amount, for any loss it suffered as surety for the corporation. Maryland then increased its line of surety credit to $2,000,000. The corporation had over $14,000,000 gross business for the period 1954 through 1962.

In 1962 the corporation seriously underbid two projects and defaulted in its performance of the project contracts. It proved necessary for Maryland to complete the work. Maryland then sought indemnity from Generes and Kelly. The taxpayer indemnified Maryland to the extent of $162,104.57. In the same year he also loaned $158,814.49 to the corporation to assist it in its financial difficulties. The corporation subsequently went into re-

ceivership and the taxpayer was unable to obtain reimbursement from it.

In his federal income tax return for 1962 the taxpayer took his loss on his direct loans to the corporation as a nonbusiness bad debt. He claimed the indemnification loss as a business bad debt and deducted it against ordinary income.[5] Later he filed claims for refund for 1959–1961, asserting net operating loss carrybacks under § 172 to those years for the portion, unused in 1962, of the claimed business bad debt deduction.

In due course the claims were made the subject of the jury trial refund suit in the United States District Court for the Eastern District of Louisiana. At the trial Mr. Generes testified that his sole motive in signing the indemnity agreement was to protect his $12,000-a-year employment with the corporation. The jury, by special interrogatory, was asked to determine whether taxpayer's signing of the indemnity agreement with Maryland "was proximately related to his trade or business of being an employee" of the corporation. The District Court charged the jury, over the Government's objection, that *significant* motivation satisfies the Regulations' requirement of proximate relationship.[6] The court refused the Government's request for an instruction that the applicable standard was that of *dominant* rather than significant motivation.[7]

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[5] This difference in treatment between the loss on the direct loan and that on the indemnity is not explained. See, however, *Whipple* v. *Commissioner*, 373 U. S. 193 (1963).

[6] "A debt is proximately related to the taxpayer's trade or business when its creation was significantly motivated by the taxpayer's trade or business, and it is not rendered a non-business debt merely because there was a non-qualifying motivation as well, even though the non-qualifying motivation was the primary one."

[7] "You must, in short, determine whether Mr. Generes' dominant motivation in signing the indemnity agreement was to protect his

After twice returning to the court for clarification of the instruction given, the jury found that the taxpayer's signing of the indemnity agreement was proximately related to his trade or business of being an employee of the corporation. Judgment on this verdict was then entered for the taxpayer.

The Fifth Circuit majority approved the significant-motivation standard so specified and agreed with a Second Circuit majority in *Weddle* v. *Commissioner,* 325 F. 2d 849, 851 (1963), in finding comfort for so doing in the tort law's concept of proximate cause. Judge Simpson dissented. 427 F. 2d, at 284. He agreed with the holding of the Seventh Circuit in *Niblock* v. *Commissioner,* 417 F. 2d 1185 (1969), and with Chief Judge Lumbard, separately concurring in *Weddle,* 325 F. 2d, at 852, that dominant and primary motivation is the standard to be applied.

II

A. The fact responsible for the litigation is the taxpayer's dual status relative to the corporation. Generes was both a shareholder and an employee. These interests are not the same, and their differences occasion different tax consequences. In tax jargon, Generes' status as a shareholder was a nonbusiness interest. It was capital in nature and it was composed initially of tax-paid dollars. Its rewards were expectative and would flow, not from personal effort, but from invest-

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salary and status as an employee or was to protect his investment in the Kelly-Generes Construction Co.

"Mr. Generes is entitled to prevail in this case only if he convinces you that the dominant motivating factor for his signing the indemnity agreement was to insure the receiving of his salary from the company. It is insufficient if the protection or insurance of his salary was only a significant secondary motivation for his signing the indemnity agreement. It must have been his dominant or most important reason for signing the indemnity agreement."

ment earnings and appreciation. On the other hand, Generes' status as an employee was a business interest. Its nature centered in personal effort and labor, and salary for that endeavor would be received. The salary would consist of pre-tax dollars.

Thus, for tax purposes it becomes important and, indeed, necessary to determine the character of the debt that went bad and became uncollectible. Did the debt center on the taxpayer's business interest in the corporation or on his nonbusiness interest? If it was the former, the taxpayer deserves to prevail here. *Trent* v. *Commissioner,* 291 F. 2d 669 (CA2 1961); *Jaffe* v. *Commissioner,* T. C. Memo ¶ 67,215; *Estate of Saperstein* v. *Commissioner,* T. C. Memo ¶ 70,209; *Faucher* v. *Commissioner,* T. C. Memo ¶ 70,217; *Rosati* v. *Commissioner,* T. C. Memo ¶ 70,343; Rev. Rul. 71–561, 1971–50 Int. Rev. Bull. 13.

B. Although arising in somewhat different contexts, two tax cases decided by the Court in recent years merit initial mention. In each of these cases a major shareholder paid out money to or on behalf of his corporation and then was unable to obtain reimbursement from it. In each he claimed a deduction assertable against ordinary income. In each he was unsuccessful in this quest:

1. In *Putnam* v. *Commissioner,* 352 U. S. 82 (1956), the taxpayer was a practicing lawyer who had guaranteed obligations of a labor newspaper corporation in which he owned stock. He claimed his loss as fully deductible in 1948 under § 23 (e)(2) of the 1939 Code. The standard prescribed by that statute was incurrence of the loss "in any transaction entered into for profit, though not connected with the trade or business." The Court rejected this approach and held that the loss was a nonbusiness bad debt subject to short-term capital loss treatment under § 23 (k)(4). The loss was deductible

as a bad debt or not at all. See Rev. Rul. 60–48, 1960–1 Cum. Bull. 112.

2. In *Whipple* v. *Commissioner*, 373 U. S. 193 (1963), the taxpayer had provided organizational, promotional, and managerial services to a corporation in which he owned approximately an 80% stock interest. He claimed that this constituted a trade or business and, hence, that debts owing him by the corporation were business bad debts when they became worthless in 1953. The Court also rejected that contention and held that Whipple's investing was not a trade or business, that is, that "[d]evoting one's time and energies to the affairs of a corporation is not of itself, and without more, a trade or business of the person so engaged." 373 U. S., at 202. The rationale was that a contrary conclusion would be inconsistent with the principle that a corporation has a personality separate from its shareholders and that its business is not necessarily their business. The Court indicated its approval of the Regulations' proximate-relation test:

> "Moreover, there is no proof (which might be difficult to furnish where the taxpayer is the sole or dominant stockholder) that the loan was necessary to keep his job or was otherwise proximately related to maintaining his trade or business as an employee. Compare *Trent* v. *Commissioner*, [291 F. 2d 669 (CA2 1961)]." 373 U. S., at 204.

The Court also carefully noted the distinction between the business and the nonbusiness bad debt for one who is both an employee and a shareholder.[8]

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[8] "Even if the taxpayer demonstrates an independent trade or business of his own, care must be taken to distinguish bad debt losses arising from his own business and those actually arising from activities peculiar to an investor concerned with, and participating in, the conduct of the corporate business." 373 U. S., at 202.

These two cases approach, but do not govern, the present one. They indicate, however, a cautious and not a free-wheeling approach to the business bad debt. Obviously, taxpayer Generes endeavored to frame his case to bring it within the area indicated in the above quotation from *Whipple* v. *Commissioner.*

III

We conclude that in determining whether a bad debt has a "proximate" relation to the taxpayer's trade or business, as the Regulations specify, and thus qualifies as a business bad debt, the proper measure is that of dominant motivation, and that only significant motivation is not sufficient. We reach this conclusion for a number of reasons:

A. The Code itself carefully distinguishes between business and nonbusiness items. It does so, for example, in § 165 with respect to losses, in § 166 with respect to bad debts, and in § 162 with respect to expenses. It gives particular tax benefits to business losses, business bad debts, and business expenses, and gives lesser benefits, or none at all, to nonbusiness losses, nonbusiness bad debts, and nonbusiness expenses. It does this despite the fact that the latter are just as adverse in financial consequence to the taxpayer as are the former. But this distinction has been a policy of the income tax structure ever since the Revenue Act of 1916, § 5 (a), 39 Stat. 759, provided differently for trade or business losses than it did for losses sustained in another transaction entered into for profit. And it has been the specific policy with respect to bad debts since the Revenue Act of 1942 incorporated into § 23 (k) of the 1939 Code the distinction between business and nonbusiness bad debts. 56 Stat. 820.

The point, however, is that the tax statutes have made the distinction, that the Congress therefore intended it

to be a meaningful one, and that the distinction is not to be obliterated or blunted by an interpretation that tends to equate the business bad debt with the nonbusiness bad debt. We think that emphasis upon the significant rather than upon the dominant would have a tendency to do just that.

B. Application of the significant-motivation standard would also tend to undermine and circumscribe the Court's holding in *Whipple* and the emphasis there that a shareholder's mere activity in a corporation's affairs is not a trade or business. As Chief Judge Lumbard pointed out in his separate and disagreeing concurrence in *Weddle, supra,* 325 F. 2d, at 852–853, both motives—that of protecting the investment and that of protecting the salary—are inevitably involved, and an inquiry whether employee status provides a significant motivation will always produce an affirmative answer and result in a judgment for the taxpayer.

C. The dominant-motivation standard has the attribute of workability. It provides a guideline of certainty for the trier of fact. The trier then may compare the risk against the potential reward and give proper emphasis to the objective rather than to the subjective. As has just been noted, an employee-shareholder, in making or guaranteeing a loan to his corporation, usually acts with two motivations, the one to protect his investment and the other to protect his employment. By making the dominant motivation the measure, the logical tax consequence ensues and prevents the mere presence of a business motive, however small and however insignificant, from controlling the tax result at the taxpayer's convenience. This is of particular importance in a tax system that is so largely dependent on voluntary compliance.

D. The dominant-motivation test strengthens and is consistent with the mandate of § 262 of the Code, 26

U. S. C. § 262, that "no deduction shall be allowed for personal, living, or family expenses" except as otherwise provided. It prevents personal considerations from circumventing this provision.

E. The dominant-motivation approach to § 166 (d) is consistent with that given the loss provisions in § 165 (c)(1), see, for example, *Imbesi* v. *Commissioner,* 361 F. 2d 640, 644 (CA3 1966), and in § 165 (c)(2), see *Austin* v. *Commissioner,* 298 F. 2d 583, 584 (CA2 1962). In these related areas, consistency is desirable. See also, *Commissioner* v. *Duberstein,* 363 U. S. 278, 286 (1960).

F. We see no inconsistency, such as the taxpayer suggests, between the Government's urging dominant motivation here and its having urged only significant motivation as the appropriate standard for the incurrence of liability for the accumulated-earnings tax under § 531 of the 1954 Code, 26 U. S. C. § 531, and for includability in the gross estate, for federal estate tax purposes, of a transfer made in contemplation of death under § 2035, 26 U. S. C. § 2035. Sections 531 and 2035 are Congress' answer to tax avoidance activity. *United States* v. *Donruss Co.,* 393 U. S. 297, 303 (1969), and *Farmers' Loan & Trust Co.* v. *Bowers,* 98 F. 2d 794 (CA2 1938), cert. denied, 306 U. S. 648 (1939).

G. The Regulations' use of the word "proximate" perhaps is not the most fortunate, for it naturally tempts one to think in tort terms. The temptation, however, is best rejected, and we reject it here. In tort law factors of duty, of foreseeability, of secondary cause, and of plural liability are under consideration, and the concept of proximate cause has been developed as an appropriate application and measure of these factors. It has little place in tax law where plural aspects are not usual, where an item either is or is not a deduction, or either is or is not a business bad debt, and where certainty is desirable.

IV

The conclusion we have reached means that the District Court's instructions, based on a standard of significant rather than dominant motivation, are erroneous and that, at least, a new trial is required. We have examined the record, however, and find nothing that would support a jury verdict in this taxpayer's favor had the dominant-motivation standard been embodied in the instructions. Judgment *n. o. v.* for the United States, therefore, must be ordered. See *Neely* v. *Eby Construction Co.*, 386 U. S. 317 (1967).

As Judge Simpson pointed out in his dissent, 427 F. 2d, at 284–285, the only real evidence offered by the taxpayer bearing upon motivation was his own testimony that he signed the indemnity agreement "to protect my job," that "I figured in three years' time I would get my money out," and that "I never once gave it [his investment in the corporation] a thought." [9]

The statements obviously are self-serving. In addition, standing alone, they do not bear the light of analysis. What the taxpayer was purporting to say was that his $12,000 annual salary was his sole motivation, and that his $38,900 original investment, the actual value of which prior to the misfortunes of 1962 we do not know, plus his loans to the corporation, plus his personal interest in the integrity of the corporation as a source of living for his son-in-law and as an investment for his son and his other son-in-law, were of no consequence whatever in his thinking. The comparison is strained all the more by the fact that the salary is pre-tax and the investment is taxpaid. With his total annual income about $40,000, Mr. Generes may well have reached a federal income tax bracket of 40% or more for a joint return in 1958–1962.

[9] App. 67 and 59.

§§ 1 and 2 of the 1954 Code, 68A Stat. 5 and 8. The $12,000 salary thus would produce for him only about $7,000 net after federal tax and before any state income tax. This is the figure, and not $12,000, that has any possible significance for motivation purposes, and it is less than ⅕ of the original stock investment.[10]

We conclude on these facts that the taxpayer's explanation falls of its own weight, and that reasonable minds could not ascribe, on this record, a dominant motivation directed to the preservation of the taxpayer's salary as president of Kelly-Generes Construction Co., Inc.

The judgment is reversed and the case is remanded with direction that judgment be entered for the United States.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE MARSHALL, concurring.

I agree with and join the opinion of the Court. In doing so I add a few additional words of legislative history in support of the wording of the Internal Revenue Code itself.

It is now well-established law that a corporate employee is entitled to deduct as a business bad debt a bad debt incurred because of his employee status—*e. g.*, a loan made to protect his job which becomes unrecoverable. See, *e. g.*, *Trent* v. *Commissioner*, 291 F. 2d 669 (CA2 1961); *Lundgren* v. *Commissioner*, 376 F. 2d 623 (CA9 1967); *Smith* v. *Commissioner*, 55 T. C. 260 (1970). See also *Whipple* v. *Commissioner*, 373 U. S. 193, 201 (1963). The law is equally well established, however, that a shareholder is not entitled to a business bad-debt

[10] Rather than ⅓, as the taxpayer in his testimony suggested, App. 59, overlooking the pre-tax character of his salaried earnings.

deduction when a loan which he has made to enhance his stock interest in a corporation goes bad.

The taxpayer in this case is both an employee and a shareholder of a single corporation, and the question thus presented is how to determine the proper tax treatment of loans made by him to the corporation that became uncollectible.

The Internal Revenue Code itself does not offer any test for determining when a bad debt is a business bad debt, but § 1.166–5 (b) of the Treasury Regulations on Income Tax provides that a loss from a worthless debt is deductible as a business bad debt only if the relation between the loss and taxpayer's trade or business is a proximate one. The Commissioner contends that the taxpayer must demonstrate that the "primary and dominant" motivation for the undertaking that gave rise to the bad debt was attributable to his status as an employee, and not as a shareholder, in order to comply with the regulation. It is the taxpayer's position that the proximate relationship is sufficiently demonstrated if the undertaking giving rise to the bad debt was "significantly" motivated by his employee status. The District Court and Court of Appeals agreed with the taxpayer.

The opinion of the Court properly concludes that acceptance of the test advocated by the taxpayer would blunt somewhat the distinction between business and nonbusiness expenses, and that the Commissioner's test is slightly more consistent with the thrust of various sections of the Internal Revenue Code. Were this all we had to work with, however, I would be as torn between the two tests as the lower courts have been. Compare *Weddle* v. *Commissioner*, 325 F. 2d 849 (CA2 1963), with *Niblock* v. *Commissioner*, 417 F. 2d 1185 (CA7 1969), and *Smith* v. *Commissioner*, 55 T. C. 260 (1970). As the Court's opinion points out, Congress did not

choose to apportion the tax treatment of bad debts according to the strength of the various interests of the taxpayer that gave rise to them. Left with an all-or-nothing approach and no legislative history, one might well conclude that Congress did intend to blunt the distinction between business and nonbusiness bad debts, especially since neither the language of the Code nor the regulations explicitly require one test or the other, and since the burden on the taxpayer of both types of losses is identical. Fortunately, there is a clear and compelling legislative history that obviates any need for speculation as to Congress' intent in enacting § 166 of the Code, 26 U. S. C. § 166. And, only the Commissioner's test is consistent with that intent.

Prior to 1942 the Internal Revenue Code treated business and nonbusiness bad debts identically. But, in that year, Congress amended § 23 (k) of the 1939 Code in order to distinguish between the two. A nonbusiness bad debt was defined as one "other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business," and business bad debts presumably encompassed all others. The demarcation remains essentially the same under § 166 of the 1954 Code except that the definition of business bad debts is expanded for the limited purpose of including within it "a debt created or acquired . . . in connection with a trade or business of the taxpayer" but not "incurred in" the business—*e. g.*, a debt growing out of a trade or business that becomes worthless under circumstances removed from the trade or business. See H. R. Rep. No. 1337, 83d Cong., 2d Sess., 21–22; S. Rep. No. 1622, 83d Cong., 2d Sess., 24; *Whipple* v. *Commissioner, supra,* at 194 n. 1; *Trent* v. *Commissioner, supra,* at 674.

The major congressional purpose in distinguishing between business and nonbusiness bad debts was to prevent taxpayers from lending money to friends or relatives who

they knew would not repay it and then deducting against ordinary income a loss in the amount of the loan. Prior to the 1942 amendment of the Code, it was apparent that taxpayers could go a long way toward escaping the Code's monetary limit on dependency deductions and its prohibition against deductions for personal expenses by casting support payments, gifts, and other expenditures in the form of loans destined to become bad debts. H. R. Rep. No. 2333, 77th Cong., 2d Sess., 45, 76–77; S. Rep. No. 1631, 77th Cong., 2d Sess., 90.

A related congressional purpose in enacting the predecessor to § 166 was "to put nonbusiness investments in the form of loans on a footing with other nonbusiness investments." *Putnam* v. *Commissioner,* 352 U. S. 82, 92 (1956). Congress recognized that there often is only a minor difference, if any, between an investment in the form of a stock purchase and one in the form of a loan to a corporation. See, *e. g., Kelley Co.* v. *Commissioner,* 326 U. S. 521 (1946); *Bowersock Mills & Power Co.* v. *Commissioner,* 172 F. 2d 904 (CA10 1949).

It is apparent that Congress was especially concerned about the possibility that closely held family businesses might exploit the technical differences among the forms in which investments can be cast in order to gain unwarranted deductions against ordinary income.

This case is a perfect example of how the "significant" motivation test undercuts the intended effect of the statute. The taxpayer was drawing an annual salary of $12,000 from a family corporation in which he had invested almost $200,000. As the guarantor of the corporation's performance and payment construction bonds, the taxpayer risked a potential liability of $2,000,000 and ultimately incurred an actual liability of $162,000, which is the amount that he sought to deduct as a business bad debt. The jury found that the risk was incurred because the taxpayer was "significantly" motivated by

his interests as a corporate employee and by his $12,000 salary. In view of all the facts set forth in the opinion of the Court, especially the fact that the taxpayer had a gross income of approximately $40,000, I have no doubt whatever that the same jury would have found that the taxpayer's "primary and dominant" motivation was to protect his investment, not his salary.

If this taxpayer had simply lent his son-in-law $162,000 and then sought to deduct that amount as a business bad debt when the latter's business collapsed, he plainly could not have prevailed. This was just the sort of intra-family loan that Congress intended to bar from treatment as a business bad debt. The fact that a corporation served as a conduit for the loan should make no difference. If the taxpayer had received only interest on the loan rather than a salary, he could claim no business bad-debt deduction. The fact that he took a nominal salary for nominal services does not, in my opinion, require a different result. Moreover, if instead of guaranteeing the construction bonds, the taxpayer had invested $162,000 in the corporation to strengthen its economic position, that investment would receive the same treatment as the prior investment of $200,000 and any loss would not be deductible against ordinary income. The fact that the intra-family contribution was made in the form of a guarantee should be irrelevant for income tax purposes.

In sum, I find that the "significant" motivation test produces results that are totally at odds with the goals of the statute. The conclusion that I draw from the legislative history is that Congress wanted to permit deductions against ordinary income for bad-debt losses only when the losses bore the same relation to the taxpayer's trade or business as did other losses that the Code permits to be deducted against ordinary income. Under § 165 (c)(1) of the Code, 26 U. S. C. § 165 (c)(1), the primary-motivation test has always been used to deter-

mine whether these other losses are incurred in a trade or business or in some other capacity, see, *e. g.*, *Imbesi* v. *Commissioner*, 361 F. 2d 640 (CA3 1966), *United States* v. *Gilmore*, 372 U. S. 39 (1963). The same test should also be utilized with respect to bad debts if Congress' will is to be done.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins.

While I join Parts I, II, and III of the Court's opinion and its judgment of reversal, I would remand the case to the District Court with directions to hold a hearing on the issue of whether a jury question still exists as to whether taxpayer's motivation was "dominantly" a business one in the relevant transactions under 26 U. S. C. §§ 166 (a) and (d). Federal Rule of Civil Procedure 50 (d) provides that when an appellate court considers a motion for judgment *n. o. v.*, it may "determin[e] that the appellee is entitled to a new trial, or . . . [direct] the trial court to determine whether a new trial shall be granted." Because of the drastic nature of a judgment *n. o. v.*, this Court has emphasized that such motions should be granted only when the procedural prerequisites of the Federal Rules have been strictly complied with. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, 215–217 (1947). In the present case, this Court has the power to reverse the judgment without the grant of a new trial since the Government properly moved for a judgment *n. o. v.* (or, in the alternative, for a new trial) in the District Court. *Neely* v. *Eby Construction Co.*, 386 U. S. 317 (1967). The circumstances here are inappropriate for such a decision, however, since taxpayer has never had an opportunity to be heard, after it is determined that his verdict cannot stand, as to whether factual issues remain on which he is entitled to a new trial. A decision

that a verdict must be overturned because the trial judge applied an erroneous evidentiary standard is unlike certain other appellate rulings that an error of law was made because it inevitably presents an accompanying factual question: is there enough evidence to present a jury question under the proper evidentiary standard? *Neely* v. *Eby Construction Co., supra,* at 327. This Court has often repeated that a trial court is the most appropriate tribunal to determine such factual questions, *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, 481–482 (1933); *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, 253 (1940), since appellate courts are awkwardly equipped to resolve such issues, particularly in the absence of adversary argument, and since the trial judge has an extensive and intimate knowledge of the evidence and issues "in a perspective peculiarly available to him alone." *Cone* v. *West Virginia Pulp & Paper Co., supra,* at 216. I would therefore allow the trial court to decide whether a new trial is merited in this case.

MR. JUSTICE DOUGLAS, dissenting.

The Treasury Regulations § 1.166–5 (b)(2), which govern this case, provide that "the character of the debt is to be determined by the relation which the loss resulting from the debt's becoming worthless bears to the trade or business of the taxpayer." The Regulations do not use the words "primary and dominant." They state: "If that relation is a proximate one in the conduct of the trade or business in which the taxpayer is engaged at the time the debt becomes worthless," the debt is deductible. *Ibid.*

The jury was instructed in the words of the Regulations: "Do you find from a preponderance of the evidence that the signing of the blanket indemnity agreement by Mr. Generes was proximately related to his trade or busi-

ness of being an employee of the Kelly-Generes Construction Company?" The jury unanimously answered "Yes."

There was evidence to support the finding. Generes was an officer of the company and received a salary of $12,000 a year. His job as officer was to obtain the bonding credit needed by the company to perform the jobs on which it bid. To get the bond Generes, the president, and Kelly, the vice-president, were required to sign personally an indemnity agreement.

The bond was essential if the company was to operate. Without the bond the company could not obtain business and, if that happened, he as an officer would lose his job. It therefore seems to me that signing the bond had a "proximate" relation to his business as a salaried officer in the sense that it was directly related to the hoped-for success of that business.

Whether it was a prudent act is not our concern. Nor is it our concern whether with the benefit of hindsight we can now say that signing the bond entailed risks wholly disproportionate to the stake Generes had in maintaining a job with a $12,000-a-year salary.

Obtaining a bond was essential to the corporation; and it was only by keeping the business going that the salaried position of Generes could be made secure. If the Regulations do not meet the desires of the Treasury Department, they can be rewritten. See *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100–102.

I protest now what I have repeatedly protested, and that is the use of this Court to iron out ambiguities in the Regulations or in the Act, when the responsible remedy is either a recasting of the Regulations by Treasury or presentation of the problem to the Joint Committee on Internal Revenue Taxation which is a standing com-

mittee of the Congress[1] that regularly rewrites the Act and is much abler than are we to forecast revenue needs and spot loopholes where abuses thrive.

As I said in *Commissioner* v. *Lester,* 366 U. S. 299, 307, "Resort to litigation, rather than to Congress, for a change in the law is too often the temptation of government which has a longer purse and more endurance than any taxpayer." (Concurring opinion.) And see *Knetsch* v. *United States,* 364 U. S. 361, 371 (dissenting opinion).

Had I voted to grant this petition I would be in a position to vote to dismiss it as improvidently granted. But to give integrity to the "rule of four" by which certiorari is granted[2] the objectors must participate in a

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[1] See *United States* v. *Skelly Oil Co.,* 394 U. S. 678, 690–691 (dissenting opinion).

[2] The "rule of four" is not in the statute. But in the hearings on the bill that became the 1925 Act, Mr. Justice Van Devanter, who headed the committee of the Court sponsoring the Act before the Congress, said:

"For instance, if there were five votes against granting the petition and four in favor of granting it, it would be granted, because we proceed upon the theory that when as many as four members of the court, and even three in some instances, are impressed with the propriety of our taking the case the petition should be granted. This is the uniform way in which petitions for writs of certiorari are considered." Hearing on S. 2060 and S. 2061 before a Subcommittee of the Senate Committee on the Judiciary, 68th Cong., 1st Sess., 29 (1924).

And the Congress acted in reliance on that representation. See H. R. Rep. No. 1075, 68th Cong., 2d Sess., 3.

The bill was originally drafted in 1922 by Chief Justice Taft with the assistance of Mr. Justice Day, Mr. Justice Van Devanter, and Mr. Justice McReynolds. Hearings on Jurisdiction of Circuit Courts of Appeals and United States Supreme Court before the House Committee on the Judiciary, 67th Cong., 2d Sess. (1922). The Committee representing the Court in the 1924 Hearings were Mr. Justice Van Devanter, Mr. Justice McReynolds, and Mr. Justice Sutherland. Hearing on S. 2060 and S. 2061, *supra,* at 1.

decision, as stated at length by the late Mr. Justice Harlan in *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 559–562.

In that view I cannot say that on the facts of this case the loss did not have a "proximate" relation to this corporate officer's business of keeping the enterprise afloat. I would affirm the Court of Appeals, 427 F. 2d 279.

NATIONAL LABOR RELATIONS BOARD *v.* SCRIVENER, DBA AA ELECTRIC CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 70-267. Argued January 12, 1972—Decided February 23, 1972

Employer's discharge of employees because they gave written sworn statements to a National Labor Relations Board field examiner investigating an unfair labor practice charge filed against the employer, but who had neither filed the charge nor testified at a formal hearing on the charge, constituted a violation of § 8 (a) (4) of the National Labor Relations Act. Pp. 121–125.

435 F. 2d 1296, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

William Terry Bray argued the cause for petitioner. With him on the brief were *Solicitor General Griswold, Peter G. Nash, Norton J. Come,* and *Paul J. Spielberg.*

Donald W. Jones argued the cause and filed a brief for respondent.

William B. Barton and *Harry J. Lambeth* filed a brief for Associated Builders & Contractors, Inc., as *amicus curiae.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Section 8 of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U. S. C. § 158, provides:

> "SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> . . . . . .

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

. . . . . .

Section 7 of the Act, as amended, 61 Stat. 140, 29 U. S. C. § 157, provides:

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

This case presents the issue whether an employer's retaliatory discharge of an employee who gave a written sworn statement to a National Labor Relations Board field examiner investigating an unfair labor practice charge filed against the employer, but who had not filed the charge or testified at a formal hearing on it, constitutes a violation of § 8 (a)(1) or of § 8 (a)(4) of the Act. The Board, with one member not participating, unanimously held that it was. 177 N. L. R. B. 504 (1969). The United States Court of Appeals for the Eighth Circuit, by a unanimous panel vote, held otherwise and denied enforcement. 435 F. 2d 1296 (1971). The Court of Appeals did not reach other issues raised by the employer. We granted certiorari in order to review a decision that appeared to have an important impact upon the administration of the Act. 404 U. S. 821 (1971).

I

There is testimony in the record, credited by the trial examiner and adopted by the Board, to the following effect:

The respondent Robert Scrivener is a small electrical contractor in Springfield, Missouri. He does business as

an individual proprietor under the name of AA Electric Company. On March 18, 1968, five of Scrivener's six employees signed cards authorizing a union [1] to represent them in collective bargaining. The next day business agent Moore advised Mr. Scrivener of the union's majority status and asked to negotiate a contract. Scrivener examined the cards, but refused the request.

Mr. Scrivener then visited his jobsites and complained to his employees about their action. On March 20 he dismissed card-signers Cockrum, Smith, and Wilson, and hired Hunt, a journeyman, and Statton, a helper. Hunt had worked for Scrivener on prior occasions.

On March 21 the union filed charges with the Board alleging that the company had violated §§ 8 (a)(1), (3), and (5) of the Act. On March 26 the three dischargees returned to work. The next day, however, Cockrum and Smith again were released on the ground that there was a lack of work. The two new employees and Perryman, the sole nonsigner among the six original employees, were retained. Smith was again recalled on April 1 and, with the other card-signers, except Cockrum, continued to work until April 18.

On April 17 a field examiner from the Board's regional office met with Mr. Scrivener and discussed the charges that had been filed. That evening the examiner interviewed the five card-signers at the union hall. He took affidavits or sworn statements from all except Cockrum who was not then working for Scrivener. On April 18 Scrivener inquired of at least two of the men whether they had met and been interviewed by the examiner the evening before. At the end of the day Scrivener dismissed the four who had given the statements; he did so with the explanation that he had no work for them to do.

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[1] Local 453, International Brotherhood of Electrical Workers, AFL–CIO.

Perryman, Hunt, and Statton continued to work on the three houses and the 11-unit apartment building the company had under construction at the time.

On May 13 the union filed an amended charge adding the allegation that the dismissal of the four men on April 18 was because they had given the statements to the examiner in connection with the earlier charge, and that this was a violation of § 8 (a)(1) and § 8 (a)(4). Three of the men returned to work in May or early June. The fourth was never recalled.

A complaint was issued on both the original charge and the added allegation.

II

The Board, in agreement with the trial examiner, concluded that the April 18 dismissal of the four employees was "in retaliation against them for having met with and given evidence to a Board field examiner investigating unfair labor practice charges which had been filed against" Scrivener; that "[t]he investigation of charges filed is an integral and essential stage of Board proceedings"; and that this conduct violated § 8 (a)(1) and § 8 (a)(4). 177 N. L. R. B., at 504. The customary order to cease and desist, to reinstate the four employees with back pay, and to post notices was issued. The Board concluded, however, in disagreement with the trial examiner and with one member dissenting, "that it will not effectuate the policies of the Act for the Board to assert jurisdiction herein over the alleged independent and unrelated violations of Section 8 (a)(1), (3), and (5) of the Act," and dismissed those portions of the complaint. *Id.*, at 504, 505.

The Court of Appeals, *per curiam*, relying on its earlier decision in *NLRB* v. *Ritchie Mfg. Co.*, 354 F. 2d 90 (CA8 1965), held that § 8 (a)(4) does not "encompass discharge of employees for giving written sworn statements to Board field examiners." In *Ritchie* the court had

stated, "We are reluctant to hold that § 8 (a)(4) can be extended to cover preliminary preparations for giving testimony." 354 F. 2d, at 101.[2] In the present case, the court refused to uphold the Board's finding that the challenged discharges violated § 8 (a)(1) as well as § 8 (a)(4) since "[t]o do so would be to overrule *Ritchie* implicitly, and we are not prepared to take that action." 435 F. 2d, at 1297.

III

The view of the Court of Appeals is that § 8 (a)(4) of the Act serves to protect an employee against an employer's reprisal only for *filing* an unfair labor practice charge or for giving *testimony* at a formal hearing, and that it affords him no protection for otherwise participating in the investigative stage or, in particular, for giving an affidavit or sworn statement to the investigating field examiner.

We disagree for several reasons.

1. Construing § 8 (a)(4) to protect the employee during the investigative stages, as well as in connection with the filing of a formal charge or the giving of formal testimony, comports with the objective of that section. Mr. Justice Black, in no uncertain terms, spelled out the congressional purpose:

> "Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board. This is shown by its adoption of § 8 (a)(4) which makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges. And it has been held that it is unlawful for an employer to seek to restrain an employee in the exercise of his right to file

[2] Apparently all the Ritchie employee did was "to prepare to testify." 354 F. 2d, at 101.

charges" (citations omitted). *Nash* v. *Florida Industrial Comm'n*, 389 U. S. 235, 238 (1967).

This complete freedom is necessary, it has been said, "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *John Hancock Mut. Life Ins. Co.* v. *NLRB*, 89 U. S. App. D. C. 261, 263, 191 F. 2d 483, 485 (1951). It is also consistent with the fact that the Board does not initiate its own proceedings; implementation is dependent "upon the initiative of individual persons." *Nash* v. *Florida Industrial Comm'n*, *supra*, 389 U. S., at 238; *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U. S. 418, 424 (1968).

2. The Act's reference in § 8 (a)(4) to an employee who "has filed charges or given testimony," could be read strictly and confined in its reach to formal charges and formal testimony. It can also be read more broadly. On textual analysis alone, the presence of the preceding words "to discharge or otherwise discriminate" reveals, we think, particularly by the word "otherwise," an intent on the part of Congress to afford broad rather than narrow protection to the employee. This would be consistent with § 8 (a)(4)'s purpose and objective hereinabove described. A similar question with respect to the word "evidence" in §§ 11 (1) and (2) of the Act, 29 U. S. C. §§ 161 (1) and (2), was considered in *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, 768–769 (1969), and was resolved by a broad and not a narrow construction.[3] That precedent is pertinent here.

3. This broad interpretation of § 8 (a)(4) accords with the Labor Board's view entertained for more than 35 years. Section 8 (a)(4) had its origin in the Na-

[3] The three Justices who concurred in the result joined Part III of the plurality opinion. 394 U. S., at 769.

tional Industrial Recovery Act, 48 Stat. 195. Executive Order No. 6711, issued May 15, 1934, under that Act (10 NRA Codes of Fair Competition 949), provided, "No employer . . . shall dismiss or demote any employee for making a complaint or giving evidence with respect to an alleged violation . . . ." The first Labor Board interpreted that phrase to protect the employee not only as to formal testimony, but also as to the giving of information relating to violations of the NIRA. *New York Rapid Transit Corp.*, 1 N. L. R. B. Dec. 192 (1934) (affidavits); *Ralph A. Freundlich, Inc.*, 2 N. L. R. B. Dec. 147, 148 (1935) (state court testimony). In § 8 (a)(4) the word "testimony," rather than "evidence," appears. But the new language was described as "merely a reiteration" of the Executive Order language and it was stated that the "need for this provision is attested" by the above-cited Board decisions. Comparison of S. 2926 (73d Cong.) and S. 1958 (74th Cong.), Senate Committee Print 29, 1 Leg. Hist. of National Labor Relations Act 1319, 1355 (1949).[4]

4. This interpretation, in our view, also squares with the practicalities of appropriate agency action. An employee who participates in a Board investigation may not be called formally to testify or may be discharged before any hearing at which he could testify. His contribution might be merely cumulative or the case may be settled or dismissed before hearing. Which em-

[4] We do not regard three Board cases, *Albert J. Bartson*, 23 N. L. R. B. 666, 673–674 (1940); *F. W. Poe Mfg. Co.*, 27 N. L. R. B. 1257, 1270 (1940); and *The Kramer Co.*, 29 N. L. R. B. 921, 935 (1941), cited by the *amicus*, as indicative of a contrary Board interpretation. In each of those cases the employee had filed a charge. The Board's reference, in each opinion, to that fact and its further reference, in the last two cases, to the "express statutory protection afforded employees" by § 8 (a)(4), are expected and natural references and do not, in our view, indicate a narrow approach to the statute.

ployees receive statutory protection should not turn on the vagaries of the selection process or on other events that have no relation to the need for protection. It would make less than complete sense to protect the employee because he participates in the formal inception of the process (by filing a charge) or in the final, formal presentation, but not to protect his participation in the important developmental stages that fall between these two points in time. This would be unequal and inconsistent protection and is not the protection needed to preserve the integrity of the Board process in its entirety.[5]

5. The Board's subpoena power also supports this interpretation. Section 11 of the Act, 29 U. S. C. § 161, gives the Board this power for "the purpose of all hearings and investigations." Once an employee has been subpoenaed he should be protected from retaliatory action regardless of whether he has filed a charge or has actually testified. Judge Lumbard pertinently described it:

> "It is, we think, a permissible inference that Congress intended the protection to be as broad as the [subpoena] power." *Pedersen* v. *NLRB*, 234 F. 2d 417, 420 (CA2 1956).

Under this reasoning, if employees of Scrivener had been subpoenaed, they would have been protected. There is no basis for denying similar protection to the voluntary participant.

6. The approach to § 8 (a)(4) generally has been a liberal one in order fully to effectuate the section's remedial purpose. In *M & S Steel Co.* v. *NLRB*, 353 F. 2d 80 (CA5 1965), the court sustained the Board's

[5] We are not persuaded that the reach of § 8 (a)(3), 29 U. S. C. § 158 (a)(3), and the criminal penalty provided by § 12, 29 U. S. C. § 162, provide the required protection that justifies a narrow reading of § 8 (a)(4).

finding, 148 N. L. R. B. 789, 792–795 (1964), that § 8 (a) (4) was violated by the discharge of an employee, Williams, because he gave a statement to a field examiner. In *NLRB* v. *Dal-Tex Optical Co.*, 310 F. 2d 58, 60–61 (CA5 1962), the court sustained the Board, 131 N. L. R. B. 715, 721 (1961), in affording protection to an employee, Whitaker, who appeared but did not testify at a Board hearing. See *John Hancock Mut. Life Ins. Co.* v. *NLRB, supra,* and *NLRB* v. *Syracuse Stamping Co.*, 208 F. 2d 77, 79–80 (CA2 1953).[6]

We are aware of no substantial countervailing considerations. We therefore conclude that an employer's discharge of an employee because the employee gave a written sworn statement to a Board field examiner investigating an unfair labor practice charge filed against the employer constitutes a violation of § 8 (a)(4) of the National Labor Relations Act.

Having reached this conclusion, it is unnecessary for us to determine whether the employer's action is also a violation of § 8 (a)(1), and we expressly refrain from so doing.

IV

A final comment about the jurisdictional aspects of the case is perhaps in order. The Board found that Scrivener's operations were too small to satisfy the Board's self-imposed and published $50,000 outflow-inflow jurisdictional standard for non-retail enterprises. See *Siemons Mailing Service*, 122 N. L. R. B. 81, 85 (1958). It also found, however, that Scrivener's operations were sufficient to "have an impact on and affect interstate commerce," 177 N. L. R. B., at 504, and thus were within the Board's statutory jurisdiction as defined by § 10 (a) of the Act, 29 U. S. C. § 160 (a).

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[6] But cf. *Hoover Design Corp.* v. *NLRB*, 402 F. 2d 987 (CA6 1968) (employee who "threatened to go to the Board" or file charges).

This prompted the Board to assert jurisdiction over the §§ 8 (a)(1) and (4) claim of retaliation, but to refuse to exercise jurisdiction over the original §§ 8 (a)(1), (3), and (5) claims on the ground that the latter would have "no immediate impact on the vindication of the right of an individual to resort to the Board's processes . . . ." 177 N. L. R. B., at 505. Scrivener, as a consequence, complains that relief for him against a claimed unfair labor practice on the part of the union is unavailable.

The employer's complaint of jurisdictional unfairness is understandable. See, however, *Pedersen* v. *NLRB*, *supra*, 234 F. 2d 417. As we read the opinion of the Court of Appeals, this issue and that of the sufficiency of the evidence, and perhaps others, were not reached when that court decided the § 8 (a)(4) issue as it did. We note that that court described the Board's jurisdiction to act as "marginal." 435 F. 2d, at 1296. In any event, this and any other issues may be canvassed on remand.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings.

It is so ordered.

DUNCAN *v.* TENNESSEE

CERTIORARI TO THE SUPREME COURT OF TENNESSEE

No. 70–5122. Argued January 13, 1972—Decided February 23, 1972

224 Tenn. 712, 462 S. W. 2d 491, certiorari dismissed as improvidently granted.

Rodger N. Bowman argued the cause and filed a brief for petitioner.

Everett H. Falk, Assistant Attorney General of Tennessee, argued the cause for respondent. With him on the brief was *Robert E. Kendrick*, Deputy Attorney General.

PER CURIAM.

We granted certiorari in this case, 404 U. S. 821, to consider questions seemingly presented under the constitutional guarantee against double jeopardy. After briefing and oral argument, it now appears that those questions are so interrelated with rules of criminal pleading peculiar to the State of Tennessee, the constitutionality of which is not at issue, as not to warrant the exercise of the certiorari jurisdiction of this Court. See, *e. g.*, *Wilson* v. *State*, 200 Tenn. 309, 292 S. W. 2d 188 (1956); *Young* v. *State*, 185 Tenn. 596, 206 S. W. 2d 805 (1947). See U. S. Sup. Ct. Rule 19 (1)(a). The writ is, therefore, dismissed as having been improvidently granted.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

In dismissing the writ of certiorari in this case, the Court lets stand a conviction secured in violation of petitioner's right, under the Fifth and Fourteenth Amendments, not to be placed in jeopardy twice for a single criminal offense. The infringement of this

fundamental right is so plain on the record before us that I am compelled to dissent.

Petitioner and a codefendant, Brooks, were brought to trial in the Criminal Court of Montgomery County, Tennessee, on an indictment charging armed robbery "by the use of a deadly weapon, to-wit: A Gun to-wit: a pistol . . . ." [1] The jury was selected and sworn, the indictment read, and a plea of not guilty entered on the defendants' behalf. The State's first witness, the officer investigating the robbery, testified that he had been looking for a "22 rifle" used in the commission of the crime. Defense counsel immediately objected to this evidence as immaterial to a charge of armed robbery with a pistol, and after some discussion out of the jury's presence, his objection was sustained. The prosecutor then informed the court that he had used the word "pistol" in the indictment by mistake and that in view of the court's refusal to admit evidence of the rifle, the State could proceed no further with its case and would move for a directed verdict of acquittal on the ground of erroneous indictment. The trial court granted this motion over defendants' objection and instructed the jury "to find, or to acquit the Defendants of the charge in view of that error in the indictment."

About eight months later, in March 1969, the defendants were again brought to trial for the same armed robbery. The new indictment was identical to the old

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[1] Tenn. Code Ann. § 39-3901 (Supp. 1970) provides:

"Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear. Every person convicted of the crime of robbery shall be imprisoned in the penitentiary not less than five (5) nor more than fifteen (15) years; provided, that if the robbery be accomplished by the use of a deadly weapon the punishment shall be death by electrocution, or the jury may commute the punishment to imprisonment for life or for any period of time not less than ten (10) years."

as to date, victim, and amount of money stolen and differed only in its description of the weapon as a "22 caliber rifle." Nevertheless, defendants' plea of double jeopardy was overruled by the court, and they were convicted and sentenced to 10 years' imprisonment. The State Court of Criminal Appeals sustained defendants' double jeopardy claim on appeal, but the Supreme Court of Tennessee reversed. *State* v. *Brooks,* 224 Tenn. 712, 462 S. W. 2d 491 (1970). It agreed that evidence of the rifle was properly excluded at the first trial, since under Tennessee's "strict" variance rule " 'an allegation in an indictment which is not impertinent or foreign to the cause [such as specifying the weapon as a pistol] must be proved, though a prosecution for the same offense might be supported without such allegation' . . . ." 224 Tenn., at 717, 462 S. W. 2d, at 494 (italics omitted), quoting *Hite* v. *State,* 17 Tenn. 357, 377 (1836) (theft of note payable at *Mechanics'* and Traders' Bank inadmissible on indictment specifying note payable at *Merchants'* and Traders' Bank). See also *Wilson* v. *State,* 200 Tenn. 309, 292 S. W. 2d 188 (1956) (proof of theft of bronze rollers material variance from indictment charging theft of brass rollers). The court went on to hold, however, that since the variance between "pistol" and "rifle" was sufficient to render the initial indictment defective, it was likewise sufficient to distinguish the second indictment from the first for double jeopardy purposes. " 'To entitle a prisoner to the benefit of the plea of autrefois acquit, it is necessary that the crimes charged in the last bill of indictment be precisely the same with that charged in the first, and that the first bill of indictment is good in point of law. The true test by which the question whether such a plea is a sufficient bar may be tried is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal convic-

tion upon the first.' " 224 Tenn., at 715, 462 S. W. 2d, at 493, quoting *Hite* v. *State, supra,* at 375–376. Though recognizing the application of the Double Jeopardy Clause to the States, *Benton* v. *Maryland,* 395 U. S. 784 (1969), the court concluded that the strict variance rule "when consistently applied as a test for both variance and double jeopardy, will affect equally both the state and the defendant, and in our opinion not offend the Fourteenth Amendment." 224 Tenn., at 719, 462 S. W. 2d, at 494. A petition for rehearing based on this Court's decision in *Ashe* v. *Swenson,* 397 U. S. 436 (1970), was denied on the ground that *Ashe* "has no application to the question whether there has been double jeopardy where the first indictment is void for variance." 224 Tenn., at 720, 462 S. W. 2d, at 495.

The guarantee against double jeopardy is " 'fundamental to the American scheme of justice,' " *Benton* v. *Maryland, supra,* at 796, designed to ensure that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States,* 355 U. S. 184, 187–188 (1957). Thus, we must view with a cautious eye any suggestion, as in the denial of rehearing below, that a particular trial, once commenced, might not result in the attachment of jeopardy under the Constitution. As the State conceded at oral argument, that suggestion is not sustainable here. Had petitioner's first trial gone no further than the impaneling of a jury, this in itself would have served to invoke the constitutional guarantee, for it is now settled that "a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his

consent he cannot be tried again." *Id.*, at 188. There are exceptions to this rule, of course, as in the case of a hung jury, *United States* v. *Perez*, 9 Wheat. 579 (1824), or military emergency requiring withdrawal of charges, *Wade* v. *Hunter*, 336 U. S. 684 (1949), but they do not apply here.

In any event, we need not rely on the calling of a jury to find an attachment of jeopardy, for it is clear that petitioner was not only tried for robbery in the initial proceeding, but was in fact acquitted at the direction of the court. His acquittal, being the final verdict in a court of competent jurisdiction, automatically precluded the State from retrying him for the same offense, even though, as the court below pointed out, the direction to acquit arose from a defect in the indictment. It has long been the rule of this Court that "former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, *and it was found upon a defective indictment*. The protection is not . . . against the peril of second punishment, but against being again tried for the same offense." *Kepner* v. *United States*, 195 U. S. 100, 130 (1904) (emphasis added). See also *United States* v. *Ball*, 163 U. S. 662, 669–670 (1896); *Fong Foo* v. *United States*, 369 U. S. 141 (1962) (directed verdict of acquittal, though "egregiously erroneous," bars retrial on the same charge); *Benton* v. *Maryland*, *supra*, at 796–797. Nor is this rule a mere nicety of abstract constitutional theory. The prosecution might have any number of reasons for wanting to halt a trial at midpoint and begin anew, and the indictment offers a fertile source for the discovery of error. To permit the State to obtain a final verdict by asserting its own mistake in the indictment and then to retry the defendant on the theory that jeopardy had not attached is to subject him to the very dangers that the Double Jeopardy

Clause was designed to avoid. The State very properly conceded at oral argument that petitioner "was placed in jeopardy in the first trial." Tr. of Oral Arg. 23.

The only question, then, is whether the petitioner was tried twice for the same offense. Tennessee argues that under its strict-variance rule the specification of "pistol" in the first indictment charged an entirely different offense from the armed robbery with a "rifle" alleged in the second, since the "same evidence" could not be used to prove both charges. Whatever relevance this doctrine may have in determining a variance between indictment and proof within a single trial, it certainly does not comport with the double jeopardy standards of the Fifth and Fourteenth Amendments. In my view, "the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson, supra,* at 453–454 (concurring opinion). This the State has clearly failed to do. At petitioner's first trial the State was prepared to proceed on evidence that a rifle had been used in the robbery. The first witness testified as to a rifle, and the rifle itself was apparently in the courtroom in full view of the jury. Following petitioner's acquittal, the State again tried him for armed robbery with a rifle. The same witness was called to testify about the rifle as in the first trial, and the same rifle was present in the courtroom. In short, though the first indictment charged petitioner with using a "pistol," the State could also have charged him with use of a rifle, based on the very same evidence, both physical and testimonial, on which he was eventually convicted at the second trial. Having failed to do so and having obtained a final verdict at the first trial, the State was barred, in my opinion, from bringing a

second prosecution based on this "single criminal act." [2]

The majority's refusal to address these issues is inexplicable. It may be that the prosecution in this case did not have available to it a ready means, under state law, of amending the first indictment and thus had no choice but to end the trial and begin again. If so, its remedy lies in changing Tennessee's criminal procedure, not in denying petitioner the constitutional protection to which he is entitled. Petitioner was tried twice for the same offense, and his conviction should be reversed. *United States* v. *Jorn,* 400 U. S. 470, 488 (1971) (Black and BRENNAN, JJ., concurring). I would grant him that relief.

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[2] It is not entirely clear that the two indictments charged different offenses even under state law. In *State ex rel. Anderson* v. *Winsett,* 217 Tenn. 564, 399 S. W. 2d 741 (1965), the Tennessee Supreme Court stated the following with regard to the state robbery statute, *supra,* n. 1:

"When the Legislature determined in 1955 to amend the penalty statute for the crime of robbery, it was obvious that robbery by the use of a deadly weapon was dangerous to life for many reasons, and thus it was that the act was amended to make the penalty for the crime of robbery with a deadly weapon as stated above, to try to prevent the use of a deadly weapon in the perpetration of a robbery. [But] so adding this increased punishment for the increased gravity of the crime does not create a separate or distinct offense, but merely provides for increased punishment of such offender because of the presence of aggravating circumstances." *Id.,* at 567–568, 399 S. W. 2d, at 743.

Relying on *Winsett* and the robbery statute itself, petitioner contends, with some force in my view, that the only crime charged in either prosecution was "robbery," with the use of the weapon and its specification in the indictment adding only to the punishment that might be imposed.

BULLOCK ET AL. *v.* CARTER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 70–128. Argued November 17, 1971—Decided February 24, 1972

Appellees who sought to become candidates for local office in the Texas Democratic primary election challenged in the District Court the validity of the Texas statutory scheme which, without write-in or other alternative provisions, requires payment of fees ranging as high as $8,900. Appellees claimed that they were unable to pay the required fees and were therefore barred from running. Under the Texas statute, the party committee estimates the total cost of the primary and apportions it among candidates according to its judgment of what is "just and equitable," in light of "the importance, emolument, and term of office." The fees for local candidates tend appreciably to exceed those for statewide candidates. Following a hearing, the District Court declared the fee system invalid and enjoined its enforcement. Appellants contend that the filing fees are necessary both to regulate the primary ballot and to finance elections. *Held:* The Texas primary election filing-fee system contravenes the Equal Protection Clause of the Fourteenth Amendment. Pp. 140–149.

(a) Since the Texas statute imposes filing fees of such magnitude that numerous qualified candidates are precluded from filing, it falls with unequal weight on candidates and voters according to their ability to pay the fees, and therefore it must be "closely scrutinized" and can be sustained only if it is reasonably necessary to accomplish a legitimate state objective and not merely because it has some rational basis. Pp. 140–144.

(b) Although a State has an interest in regulating the number of candidates on the ballot and eliminating those who are spurious, it cannot attain these objectives by arbitrary means such as those called for by the Texas statute, which eliminates legitimate potential candidates, like those involved here, who cannot afford the filing fees. Pp. 144–147.

(c) The apportionment of costs among candidates is not the only means available to finance primary elections, and the State can identify certain bodies as political parties entitled to sponsorship if the State itself finances the primaries, as it does general

elections, both of which are important parts of the democratic process. Pp. 147–149.

321 F. Supp. 1358, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

John F. Morehead, Special Assistant Attorney General of Texas, and *Pat Bailey,* Assistant Attorney General, argued the cause for appellants. With them on the brief were *Crawford C. Martin,* Attorney General, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, *J. C. Davis, William J. Craig,* and *W. O. Shultz II,* Assistant Attorneys General, and *Charles F. Herring.*

A. L. Crouch argued the cause for appellees Wischkaemper et al. With him on the brief was *Eugene L. Smith* for appellee Carter. *Joseph A. Calamia* argued the cause for appellees Pate et al. With him on the briefs was *John L. Fashing.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Under Texas law, a candidate must pay a filing fee as a condition to having his name placed on the ballot in a primary election.[1] The constitutionality of the Texas filing-fee system is the subject of this appeal from the judgment of a three-judge District Court.

Appellee Pate met all qualifications to be a candidate in the May 2, 1970, Democratic primary for the office of County Commissioner of Precinct Four for El Paso County, except that he was unable to pay the $1,424.60 assessment required of candidates in that pri-

[1] See Arts. 13.07a, 13.08, 13.08a, 13.15, and 13.16 of the Texas Election Code Ann. (Supp. 1970–1971).

mary. Appellee Wischkaemper sought to be placed on the Democratic primary ballot as a candidate for County Judge in Tarrant County, but he was unable to pay the $6,300 assessment for candidacy for that office. Appellee Carter wished to be a Democratic candidate for Commissioner of the General Land Office; his application was not accompanied by the required $1,000 filing fee.[2]

After being denied places on the Democratic primary ballots in their respective counties, these appellees instituted separate actions in the District Court challenging the validity of the Texas filing-fee system. Their actions were consolidated, and a three-judge District Court was convened pursuant to 28 U. S. C. §§ 2281 and 2284. Appellee Jenkins was permitted to intervene as a voter on his claimed desire to vote for Wischkaemper, and appellee Guzman and others were permitted to intervene as voters desiring to cast their ballots for Pate. On April 3, 1970, the District Court ordered that Wischkaemper and Pate be permitted to participate in the primary conducted on May 2, 1970, without prepayment of filing fees.[3] Following a hearing on the merits, the three-judge court declared the Texas filing-fee scheme unconstitutional and enjoined its enforcement.[4] 321 F. Supp. 1358 (ND Tex. 1970). A direct

[2] Carter also failed to have his application notarized and to have it accompanied by a statutory loyalty affidavit. Since appellees Pate and Wischkaemper were in all respects eligible to be candidates in the primary except for their failure to pay the filing fees, Carter's participation in this appeal is superfluous and we need not decide whether the additional defects in his application deprive him of standing to attack the constitutionality of the filing-fee system.

[3] The order provided that their ultimate liability for the fees would depend on the outcome of this action. Preliminary relief was not granted to Carter because of his noncompliance with requisites for candidacy unrelated to the challenged filing fees. See n. 2, *supra*.

[4] The specific provisions held unconstitutional are those listed in n. 1, *supra*.

appeal was taken under 28 U. S. C. § 1253, and we noted probable jurisdiction. 403 U. S. 904.

Under the Texas statute, payment of the filing fee is an absolute prerequisite to a candidate's participation in a primary election. There is no alternative procedure by which a potential candidate who is unable to pay the fee can get on the primary ballot by way of petitioning voters,[5] and write-in votes are not permitted in primary elections for public office.[6] Any person who is willing and able to pay the filing fee and who meets the basic eligibility requirements for holding the office sought can run in a primary.

Candidates for most district, county, and precinct offices must pay their filing fee to the county executive committee of the political party conducting the pri-

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[5] Texas law does permit the names of independent candidates to appear on the official ballot in the general election if a proper application containing a voter petition is submitted. The number of eligible voters required to sign the petition varies from 1% to 5% depending on the office sought. For district, county, and precinct offices, candidates must obtain the signatures of 5% of the eligible voters with a ceiling of 500 signatures. No person may sign the application of more than one person for the same office, and no person who has voted in a primary may sign the application of a candidate for an office for which a nomination was made at such primary. Art. 13.50, Tex. Election Code Ann. (1967).

No fees are assessed against candidates in general elections.

[6] Art. 13.09 (b), Tex. Election Code Ann. (Supp. 1970–1971). Write-in votes are permitted for the party offices of county chairman and precinct chairman in the general primary but not in the run-off primary. *Ibid.*

Former Art. 13.08c (repealed, Acts 1967, 60th Leg., p. 1932, c. 723, § 77) permitted write-in votes in primary elections and provided that if a write-in candidate in the first primary either received a majority of the votes or was one of the two highest vote getters in a race in which no candidate received a majority of the votes, he could not be the party's nominee in the general election or participate in the run-off primary, unless and until he paid the filing fee he would have been assessed had he originally sought a place on the primary ballot.

mary; the committee also determines the amount of the fee. The party committee must make an estimate of the total cost of the primary and apportion it among the various candidates "as in their judgment is just and equitable." [7] The committee's judgment is to be guided by "the importance, emolument, and term of office for which the nomination is to be made." [8] In counties with populations of one million or more, candidates for offices of two-year terms can be assessed up to 10% of their aggregate annual salary, and candidates for offices of four-year terms can be assessed up to 15% of their aggregate annual salary.[9] In smaller counties there are no such percentage limitations.[10]

The record shows that the fees required of the candidates in this case are far from exceptional in their magnitude.[11] The size of the filing fees is plainly a

[7] Art. 13.08, Tex. Election Code Ann. (Supp. 1970–1971).

[8] *Ibid.*

[9] Art. 13.08a, Tex. Election Code Ann. (Supp. 1970–1971). This provision is applicable to Members of Congress.

[10] The $6,300 fee required of appellee Wischkaemper, for example, amounts to 32% of the $19,700 annual salary for County Judge in Tarrant County. Similarly, in the May 2, 1970, Democratic primary, candidates for five county offices in Ward County were assessed $6,250 for a filing fee; this fee represented 76.6% of the $8,160 annual salary for four of these offices; for the fifth office, that of County Commissioner, it represented 99.7% of the annual salary of $6,270.

[11] Assessments in excess of $1,000 appear to be common in many Texas counties, and assessments exceeding $5,000 are typical for certain offices in several counties. Filing fees for judgeships seem to run particularly high. Persons seeking to run in the May 2, 1970, Democratic primary for the office of District Judge in Tarrant County were required to pay $8,900 in order to have their names appear on the ballot.

It should be noted, however, that amounts not needed to finance the primary are refunded to the candidates, and that in some counties refunds tend to run as high as 50% or more of the assessed filing fee.

natural consequence of a statutory system that places the burden of financing primary elections on candidates rather than on the governmental unit, and that imposes a particularly heavy burden on candidates for local office. The filing fees required of candidates seeking nomination for state offices and offices involving statewide primaries are more closely regulated by statute and tend to be appreciably smaller. The filing fees for candidates for State Representative range from $150 to $600, depending on the population of the county from which nomination is sought.[12] Candidates for State Senator are subject to a maximum assessment of $1,000.[13]

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[12] Arts. 13.08a, 13.16 subd. 2, Tex. Election Code Ann. (Supp. 1970–1971):

Population of County	*Filing Fee*
less than 650,000	$150
650,000 to 900,000	$600
900,000 to 1,000,000	$300
1,000,000 or more	$500

It is not clear from the face of the statute why candidates from counties having populations between 650,000 and 900,000 must pay more than candidates from counties of larger sizes.

An additional provision requires that candidates for State Representative from districts encompassing either eight or nine counties must pay $25 per county as a filing fee. Art. 13.08a, Tex. Election Code Ann. (Supp. 1970–1971).

[13] Art. 13.08a, Tex. Election Code Ann. (Supp. 1970–1971). There is a fixed-fee schedule if nomination is sought from a county with a population of 650,000 or more:

Population of County	*Filing Fee*
650,000 to 900,000*	$1,000
900,000 to 1,000,000	$ 300
1,000,000 or more	$1,000

*If part of such county is joined to two or more counties to constitute a senatorial district, the filing fee is fixed at $250.

There is a ceiling on the filing fee if nomination is sought in a senatorial district encompassing counties with less than 650,000 in

Candidates for nominations requiring statewide primaries, including candidates for Governor and United States Senator, must pay a filing fee of $1,000 to the chairman of the state executive committee of the party conducting the primary.[14] Candidates for the State Board of Education have a fixed filing fee of $50.[15]

(1)

The filing-fee requirement is limited to party primary elections, but the mechanism of such elections is the creature of state legislative choice and hence is "state action" within the meaning of the Fourteenth Amendment. *Gray* v. *Sanders*, 372 U. S. 368 (1963); *Nixon* v. *Herndon*, 273 U. S. 536 (1927).[16] Although we

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population. Art. 13.16 subd. 1, Tex. Election Code Ann. (Supp. 1970–1971):

Population of County	*Filing Fee per County*
less than 5,000	$ 1
5,000 to 10,000	$ 5
10,000 to 40,000	$ 10
40,000 to 125,000	$ 50
125,000 to 200,000	$ 75
200,000 to 650,000	$100

Persons seeking nomination in a senatorial district constituting exactly two counties must pay a filing fee of $200.

[14] Art. 13.15, Tex. Election Code Ann. (Supp. 1970–1971). Candidates for Justice of the Court of Civil Appeals are also required to pay their filing fees to the chairman of the state committee, at the rate of 5% of one year's salary. *Ibid.*

[15] Art. 13.08 (4), Tex. Election Code Ann. (Supp. 1970–1971).

[16] Appellants ask the Court to reconsider the scope of *Smith* v. *Allwright*, 321 U. S. 649 (1944), in which the Court held that the action of the Democratic Party of Texas in excluding Negroes from participation in party primaries constituted "state action." See also *Terry* v. *Adams*, 345 U. S. 461 (1953); cf. *Nixon* v. *Condon*, 286 U. S. 73 (1932). Appellants contend that not every aspect of a party primary election must be considered "state action" cognizable under the Fourteenth Amendment. But we are here concerned with

have emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications and the manner of elections, this power must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment. See, *e. g.*, *Williams* v. *Rhodes*, 393 U. S. 23 (1968); *Evans* v. *Cornman*, 398 U. S. 419 (1970); *Carrington* v. *Rash*, 380 U. S. 89 (1965). The question presented in this case is whether a state law that prevents potential candidates for public office from seeking the nomination of their party due to their inability to pay a portion of the cost of conducting the primary election is state action that unlawfully discriminates against the candidates so excluded or the voters who wish to support them.[17]

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the constitutionality of a state law rather than action by a political party and thus have no occasion to consider the scope of the holding in *Smith* v. *Allwright*, *supra*.

[17] The Texas Legislature has enacted a "contingent, temporary law" modifying the filing-fee requirement involved in this case. C. 11, H. B. 5, 62d Leg., 1st Called Sess. (1971). The new provisions allow persons unable to pay the filing fees to have their names placed on the ballot in primary elections if they submit a petition

> "signed by qualified voters eligible to vote for the office for which the candidate is running, equal in number to at least 10 percent of the entire vote cast for that party's candidate for governor in the last preceding general election in the territory . . . in which the candidate is running." (Art. 13.08c (b).)

The Act provides that it is to go into effect only if "(1) the Supreme Court of the United States does not dispose of the appeal [in this case] . . . before January 1, 1972; or (2) the Supreme Court of the United States affirms or refuses to review the judgment of the district court in the aforesaid case . . ." (§ 7 (b)). The Act expires of its own force on December 31, 1972, at which time the prior law goes back into effect.

Although the Act has gone into effect due to the absence of decision by the Court on this appeal before January 1, 1972, the change in the law does not render this case moot. The effect of the "contingent,

The threshold question to be resolved is whether the filing-fee system should be sustained if it can be shown to have some rational basis,[18] or whether it must withstand a more rigid standard of review.

In *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966), the Court held that Virginia's imposition of an annual poll tax not exceeding $1.50 on residents over the age of 21 was a denial of equal protection. Subjecting the Virginia poll tax to close scrutiny, the Court concluded that the placing of even a minimal price on the exercise of the right to vote constituted an invidious discrimination. The problem presented by candidate filing fees is not the same, of course, and we must determine whether the strict standard of review of the *Harper* case should be applied.

The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to

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temporary law" enacted by the Texas Legislature is to suspend enforcement of the strict filing-fee requirement during calendar year 1972. Since enforcement of the filing-fee requirement under the prior law was permanently enjoined by the court below, that injunction would continue to have force and effect after December 31, 1972. Furthermore, there is a continuing controversy with respect to appellees' obligation to pay the filing fees for participation in the Democratic primary held on May 2, 1970. The order of the District Court allowing appellees Pate and Wischkaemper to run in the primary without payment of fees stated that they would be liable for the fees if they did not ultimately prevail in this action. See n. 3, *supra*.

We take note of the fact that in *Johnston* v. *Luna*, 338 F. Supp. 355 (ND Tex. 1972), the same three-judge court that issued the injunction appealed from in this case, declared the new law unconstitutional and enjoined its enforcement. Our attention is confined to the case before us, and we intimate no view on the merits of that controversy.

[18] See *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970); *McGowan* v. *Maryland*, 366 U. S. 420, 425–426 (1961).

candidacy as to invoke a rigorous standard of review.[19] However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review. *McDonald* v. *Board of Election,* 394 U. S. 802 (1969). Texas does not place a condition on the exercise of the right to vote,[20] nor does it quantitatively dilute votes that have been cast.[21] Rather, the Texas system creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose. The existence of such barriers does not of itself compel close scrutiny. Compare *Jenness* v. *Fortson,* 403 U. S. 431 (1971), with *Williams* v. *Rhodes,* 393 U. S. 23 (1968). In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.

Unlike a filing-fee requirement that most candidates could be expected to fulfill from their own resources or at least through modest contributions, the very size of the fees imposed under the Texas system gives it a patently exclusionary character. Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. The effect

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[19] Cf. *Turner* v. *Fouche,* 396 U. S. 346, 362 (1970); *Snowden* v. *Hughes,* 321 U. S. 1 (1944).

[20] See *Harper* v. *Virginia Board of Elections,* 383 U. S. 663 (1966); *Kramer* v. *Union Free School Dist. No. 15,* 395 U. S. 621 (1969); *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969).

[21] See *Reynolds* v. *Sims,* 377 U. S. 533, 562 (1964); *Wesberry* v. *Sanders,* 376 U. S. 1 (1964).

of this exclusionary mechanism on voters is neither incidental nor remote. Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system. To the extent that the system requires candidates to rely on contributions from voters in order to pay the assessments, a phenomenon that can hardly be rare in light of the size of the fees, it tends to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor. Appellants do not dispute that this is endemic to the system. This disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause, and there are doubtless some instances of candidates representing the views of voters of modest means who are able to pay the required fee. But we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.

Because the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude, as in *Harper*, that the laws must be "closely scrutinized" and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster.

(2)

Appellants contend that the filing fees required by the challenged statutes are necessary both to regulate

the ballot in primary elections and to provide a means for financing such elections.

The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. *Jenness* v. *Fortson,* 403 U. S., at 442; *Williams* v. *Rhodes,* 393 U. S., at 32. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections.[22] Although we have no way of gauging the number of candidates who might enter primaries in Texas if access to the ballot were unimpeded by the large filing fees in question here, we are bound to respect the legitimate objectives of the State in avoiding overcrowded ballots. Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. *Jenness* v. *Fortson,* 403 U. S., at 442.

There is no escape from the conclusion that the imposition of filing fees ranging as high as $8,900 tends to limit the number of candidates entering the primaries. However, even under conventional standards of review, a State cannot achieve its objectives by totally arbitrary means; the criterion for differing treatment must bear some relevance to the object of the legislation. *Morey* v. *Doud,* 354 U. S. 457, 465 (1957); *Smith* v. *Cahoon,* 283 U. S. 553, 567 (1931). To say that the filing fee requirement tends to limit the ballot to the more serious candidates is not enough. There

[22] The Texas Election Code provides that no person shall be nominated at a primary election for any office unless he receives a majority of the votes cast. In the event that no candidate receives a majority, a runoff election is held between the two candidates receiving the highest number of votes. Arts. 13.03, 13.07, Tex. Election Code Ann. (1967).

may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy,[23] but the candidates in this case affirmatively alleged that they were *unable,* not simply *unwilling,* to pay the assessed fees, and there was no contrary evidence. It is uncontested that the filing fees exclude legitimate as well as frivolous candidates. And even assuming that every person paying the large fees required by Texas law takes his own candidacy seriously, that does not make him a "serious candidate" in the popular sense. If the Texas fee requirement is intended to regulate the ballot by weeding out spurious candidates, it is extraordinarily ill-fitted to that goal; [24] other means to protect those valid interests are available.

Instead of arguing for the reasonableness of the exclusion of some candidates, appellants rely on the fact that the filing-fee requirement is applicable only to party primaries, and point out that a candidate can gain a place on the ballot in the general election without payment of fees by submitting a proper application accompanied by a voter petition.[25] Apart from the fact that the primary election may be more crucial than the general election in certain parts of Texas,[26] we can hardly accept as reasonable an alternative that requires

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[23] Cf. *Harper* v. *Virginia Board of Elections,* 383 U. S., at 684–685 (Harlan, J., dissenting).

[24] Cf. *Turner* v. *Fouche,* 396 U. S., at 364.

[25] Appellants state that Texas requires only the signatures of 1% of the eligible voters. Although this is true for offices voted for statewide, the candidates for local offices in this case would have had to obtain the signatures of 5% of the eligible voters up to a maximum of 500 signatures. Moreover, only those persons not voting in the primary would have been eligible to sign a nominating petition. See n. 5, *supra.*

[26] See *Carter* v. *Dies,* 321 F. Supp. 1358, 1363 (ND Tex. 1970) (Thornberry, J., concurring).

candidates and voters to abandon their party affiliations in order to avoid the burdens of the filing fees imposed by state law. Appellants have not demonstrated that their present filing-fee scheme is a necessary or reasonable tool for regulating the ballot.

In addition to the State's purported interest in regulating the ballot, the filing fees serve to relieve the State treasury of the cost of conducting the primary elections, and this is a legitimate state objective; in this limited sense it cannot be said that the fee system lacks a rational basis.[27] But under the standard of review we consider applicable to this case, there must be a showing of necessity. Appellants strenuously urge that apportioning the cost among the candidates is the only feasible means for financing the primaries. They argue that if the State must finance the primaries, it will have to determine which political bodies are "parties" so as to be entitled to state sponsorship for their nominating process, and that this will result in new claims of discrimination. Appellants seem to overlook the fact that a similar distinction is presently embodied in Texas law since only those political parties whose gubernatorial candidate received 200,000 or more votes in the last preceding general election are required to conduct primary elections.[28] Moreover, the Court has recently upheld the validity of a state law distinguishing between political parties on the basis of success in prior elections. *Jenness* v. *Fortson, supra.* We are not persuaded that Texas would be faced with an impossible task in distinguishing between political parties for the purpose of financing primaries.

We also reject the theory that since the candidates are availing themselves of the primary machinery, it

[27] Cf. *Harper* v. *Virginia Board of Elections,* 383 U. S., at 674 (Black, J., dissenting).

[28] Art. 13.02, Tex. Election Code Ann. (1967).

is appropriate that they pay that share of the cost that they have occasioned. The force of this argument is diluted by the fact that candidates for offices requiring statewide primaries are generally assessed at a lower rate than candidates for local office, although the statewide primaries undoubtedly involve a greater expense.[29] More importantly, the costs do not arise because candidates decide to enter a primary or because the parties decide to conduct one, but because the State has, as a matter of legislative choice, directed that party primaries be held. The State has presumably chosen this course more to benefit the voters than the candidates.

Appellants seem to place reliance on the self-evident fact that if the State must assume the cost, the voters, as taxpayers, will ultimately be burdened with the expense of the primaries. But it is far too late to make out a case that the party primary is such a lesser part of the democratic process that its cost must be shifted away from the taxpayers generally. The financial burden for general elections is carried by all taxpayers and appellants have not demonstrated a valid basis for distinguishing between these two legitimate costs of the democratic process. It seems appropriate that a primary system designed to give the voters some influence at the nominating stage should spread the cost among all of the voters in an attempt to distribute the influence without regard to wealth. Viewing the myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring

[29] This would be a different case if the fees approximated the cost of processing a candidate's application for a place on the ballot, a cost resulting from the candidate's decision to enter a primary. The term *filing* fee has long been thought to cover the cost of filing, that is, the cost of placing a particular document on the public record.

forth those persons desired by their fellow citizens to govern. Without making light of the State's interest in husbanding its revenues, we fail to see such an element of necessity in the State's present means of financing primaries as to justify the resulting incursion on the prerogatives of voters.

(3)

Since the State has failed to establish the requisite justification for this filing-fee system, we hold that it results in a denial of equal protection of the laws. It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts. By requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system that utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice. These salient features of the Texas system are critical to our determination of constitutional invalidity.

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

GIGLIO *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 70-29. Argued October 12, 1971—Decided February 24, 1972

Petitioner filed a motion for a new trial on the basis of newly discovered evidence contending that the Government failed to disclose an alleged promise of leniency made to its key witness in return for his testimony. At a hearing on this motion, the Assistant United States Attorney who presented the case to the grand jury admitted that he promised the witness that he would not be prosecuted if he testified before the grand jury and at trial. The Assistant who tried the case was unaware of the promise. *Held:* Neither the Assistant's lack of authority nor his failure to inform his superiors and associates is controlling, and the prosecution's duty to present all material evidence to the jury was not fulfilled and constitutes a violation of due process requiring a new trial. Pp. 153–155.

Reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

James M. La Rossa argued the cause and filed a brief for petitioner.

Harry R. Sachse argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Jerome M. Feit,* and *Beatrice Rosenberg.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioner was convicted of passing forged money orders and sentenced to five years' imprisonment. While appeal was pending in the Court of Appeals, defense counsel discovered new evidence indicating that the Government

had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government. We granted certiorari to determine whether the evidence not disclosed was such as to require a new trial under the due process criteria of *Napue* v. *Illinois,* 360 U. S. 264 (1959), and *Brady* v. *Maryland,* 373 U. S. 83 (1963).

The controversy in this case centers around the testimony of Robert Taliento, petitioner's alleged coconspirator in the offense and the only witness linking petitioner with the crime. The Government's evidence at trial showed that in June 1966 officials at the Manufacturers Hanover Trust Co. discovered that Taliento, as teller at the bank, had cashed several forged money orders. Upon questioning by FBI agents, he confessed supplying petitioner with one of the bank's customer signature cards used by Giglio to forge $2,300 in money orders; Taliento then processed these money orders through the regular channels of the bank. Taliento related this story to the grand jury and petitioner was indicted; thereafter, he was named as a coconspirator with petitioner but was not indicted.

Trial commenced two years after indictment. Taliento testified, identifying petitioner as the instigator of the scheme. Defense counsel vigorously cross-examined, seeking to discredit his testimony by revealing possible agreements or arrangements for prosecutorial leniency:

> "[Counsel.] Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?
>
> "[Taliento.] Nobody told me I wouldn't be prosecuted.
>
> "Q. They told you you might not be prosecuted?
>
> "A. I believe I still could be prosecuted.
>
> . . . . .

"Q. Were you ever arrested in this case or charged with anything in connection with these money orders that you testified to?

"A. Not at that particular time.

"Q. To this date, have you been charged with any crime?

"A. Not that I know of, unless they are still going to prosecute."

In summation, the Government attorney stated, "[Taliento] received no promises that he would not be indicted."

The issue now before the Court arose on petitioner's motion for new trial based on newly discovered evidence. An affidavit filed by the Government as part of its opposition to a new trial confirms petitioner's claim that a promise was made to Taliento by one assistant, DiPaola,[1] that if he testified before the grand jury and at trial he would not be prosecuted.[2] DiPaola presented the Government's case to the grand jury but did not try the case in the District Court, and Golden, the assistant who took over the case for trial, filed an affidavit stating that DiPaola assured him before the trial that no promises of immunity had been made to Taliento.[3] The United

[1] During oral argument in this Court it was stated that DiPaola was on the staff of the United States Attorney when he made the affidavit in 1969 and remained on that staff until recently.

[2] DiPaola's affidavit reads, in part, as follows:

"It was agreed that if ROBERT EDWARD TALIENTO would testify before the Grand Jury as a witness for the Government, . . . he would not be . . . indicted. . . . It was further agreed and understood that he, ROBERT EDWARD TALIENTO, would sign a Waiver of Immunity from prosecution before the Grand Jury, and that if he eventually testified as a witness for the Government at the trial of the defendant, JOHN GIGLIO, he would not be prosecuted."

[3] Golden's affidavit reads, in part, as follows:

"Mr. DiPaola . . . advised that Mr. Taliento had not been granted immunity but that he had not indicted him because Robert Taliento was very young at the time of the alleged occurrence and obviously had been overreached by the defendant Giglio."

States Attorney, Hoey, filed an affidavit stating that he had personally consulted with Taliento and his attorney shortly before trial to emphasize that Taliento would definitely be prosecuted if he did not testify and that if he did testify he would be obliged to rely on the "good judgment and conscience of the Government" as to whether he would be prosecuted.[4]

The District Court did not undertake to resolve the apparent conflict between the two Assistant United States Attorneys, DiPaola and Golden, but proceeded on the theory that even if a promise had been made by DiPaola it was not authorized and its disclosure to the jury would not have affected its verdict. We need not concern ourselves with the differing versions of the events as described by the two assistants in their affidavits. The heart of the matter is that one Assistant United States Attorney—the first one who dealt with Taliento—now states that he promised Taliento that he would not be prosecuted if he cooperated with the Government.

As long ago as *Mooney* v. *Holohan,* 294 U. S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle* v. *Kansas,* 317 U. S. 213 (1942). In *Napue* v. *Illinois,* 360 U. S. 264 (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.,* at 269. Thereafter *Brady* v. *Maryland,* 373 U. S., at 87, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See Ameri-

[4] The Hoey affidavit, standing alone, contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of some understanding for leniency.

can Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11 (a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. *Napue, supra,* at 269. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . ." *United States* v. *Keogh,* 391 F. 2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under *Brady, supra,* at 87. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ." *Napue, supra,* at 271.

In the circumstances shown by this record, neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency § 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1 (d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore

an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

For these reasons, the due process requirements enunciated in *Napue* and the other cases cited earlier require a new trial, and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

PAPACHRISTOU ET AL. *v.* CITY OF JACKSONVILLE

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 70-5030. Argued December 8, 1971—Decided February 24, 1972

The Jacksonville vagrancy ordinance, under which petitioners were convicted, is void for vagueness, in that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," it encourages arbitrary and erratic arrests and convictions, it makes criminal activities that by modern standards are normally innocent, and it places almost unfettered discretion in the hands of the police. Pp. 161–171.

236 So. 2d 141, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which all Members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

Samuel S. Jacobson argued the cause and filed briefs for petitioners.

T. Edward Austin, Jr., argued the cause for respondent. With him on the brief were *James C. Rinaman, Jr.*, and *J. Edward Wall.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves eight defendants who were convicted in a Florida municipal court of violating a Jacksonville, Florida, vagrancy ordinance.[1] Their convictions

[1] Jacksonville Ordinance Code § 26–57 provided at the time of these arrests and convictions as follows:

"Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers,

were affirmed by the Florida Circuit Court in a consolidated appeal, and their petition for certiorari was denied by the District Court of Appeal on the authority of *Johnson* v. *State*, 202 So. 2d 852.[2] The case is

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persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses."

Class D offenses at the time of these arrests and convictions were punishable by 90 days' imprisonment, $500 fine, or both. Jacksonville Ordinance Code § 1–8 (1965). The maximum punishment has since been reduced to 75 days or $450. § 304.101 (1971). We are advised that that downward revision was made to avoid federal right-to-counsel decisions. The Fifth Circuit case extending right to counsel in misdemeanors where a fine of $500 or 90 days' imprisonment could be imposed is *Harvey* v. *Mississippi*, 340 F. 2d 263 (1965).

We are advised that at present the Jacksonville vagrancy ordinance is § 330.107 and identical with the earlier one except that "juggling" has been eliminated.

[2] Florida also has a vagrancy statute, Fla. Stat. § 856.02 (1965), which reads quite closely on the Jacksonville ordinance. Jacksonville Ordinance Code § 27–43 makes the commission of any Florida misdemeanor a Class D offense against the City of Jacksonville. In 1971 Florida made minor amendments to its statute. See Laws 1971, c. 71–132.

Section 856.02 was declared unconstitutionally overbroad in *Lazarus* v. *Faircloth*, 301 F. Supp. 266. The court said: "All loitering, loafing, or idling on the streets and highways of a city, even though habitual, is not necessarily detrimental to the public welfare nor is it under all circumstances an interference with travel upon them. It may be and often is entirely innocuous. The statute draws no distinction between conduct that is calculated to harm and that which is essentially innocent." *Id.*, at 272, quoting *Hawaii* v. *Anduha*, 48 F. 2d 171, 172. See also *Smith* v. *Florida*, *post*, p. 172.

The Florida disorderly conduct ordinance, covering "loitering about any hotel, block, barroom, dramshop, gambling house or

here on a petition for certiorari, which we granted. 403 U. S. 917. For reasons which will appear, we reverse.

At issue are five consolidated cases. Margaret Papachristou, Betty Calloway, Eugene Eddie Melton, and Leonard Johnson were all arrested early on a Sunday morning, and charged with vagrancy—"prowling by auto."

Jimmy Lee Smith and Milton Henry were charged with vagrancy—"vagabonds."

Henry Edward Heath and a codefendant were arrested for vagrancy—"loitering" and "common thief."

Thomas Owen Campbell was charged with vagrancy—"common thief."

Hugh Brown was charged with vagrancy—"disorderly loitering on street" and "disorderly conduct—resisting arrest with violence."

The facts are stipulated. Papachristou and Calloway are white females. Melton and Johnson are black males. Papachristou was enrolled in a job-training program sponsored by the State Employment Service at Florida Junior College in Jacksonville. Calloway was a typing and shorthand teacher at a state mental institution located near Jacksonville. She was the owner of the automobile in which the four defendants were arrested. Melton was a Vietnam war veteran who had been released from the Navy after nine months in a veterans' hospital. On the date of his arrest he was a part-time computer helper while attending college as a full-time student in Jacksonville. Johnson was a tow-motor operator in a grocery chain warehouse and was a lifelong resident of Jacksonville.

At the time of their arrest the four of them were riding

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disorderly house, or wandering about the streets either by night or by day without any known lawful means of support, or without being able to give a satisfactory account of themselves" has also been held void for "excessive broadness and vagueness" by the Florida Supreme Court, *Headley* v. *Selkowitz*, 171 So. 2d 368, 370.

in Calloway's car on the main thoroughfare in Jacksonville. They had left a restaurant owned by Johnson's uncle where they had eaten and were on their way to a nightclub. The arresting officers denied that the racial mixture in the car played any part in the decision to make the arrest. The arrest, they said, was made because the defendants had stopped near a used-car lot which had been broken into several times. There was, however, no evidence of any breaking and entering on the night in question.

Of these four charged with "prowling by auto" none had been previously arrested except Papachristou who had once been convicted of a municipal offense.

Jimmy Lee Smith and Milton Henry (who is not a petitioner) were arrested between 9 and 10 a. m. on a weekday in downtown Jacksonville, while waiting for a friend who was to lend them a car so they could apply for a job at a produce company. Smith was a part-time produce worker and part-time organizer for a Negro political group. He had a common-law wife and three children supported by him and his wife. He had been arrested several times but convicted only once. Smith's companion, Henry, was an 18-year-old high school student with no previous record of arrest.

This morning it was cold, and Smith had no jacket, so they went briefly into a dry cleaning shop to wait, but left when requested to do so. They thereafter walked back and forth two or three times over a two-block stretch looking for their friend. The store owners, who apparently were wary of Smith and his companion, summoned two police officers who searched the men and found neither had a weapon. But they were arrested because the officers said they had no identification and because the officers did not believe their story.

Heath and a codefendant were arrested for "loitering" and for "common thief." Both were residents of Jacksonville, Heath having lived there all his life and being

employed at an automobile body shop. Heath had previously been arrested but his codefendant had no arrest record. Heath and his companion were arrested when they drove up to a residence shared by Heath's girl friend and some other girls. Some police officers were already there in the process of arresting another man. When Heath and his companion started backing out of the driveway, the officers signaled to them to stop and asked them to get out of the car, which they did. Thereupon they and the automobile were searched. Although no contraband or incriminating evidence was found, they were both arrested, Heath being charged with being a "common thief" because he was reputed to be a thief. The codefendant was charged with "loitering" because he was standing in the driveway, an act which the officers admitted was done only at their command.

Campbell was arrested as he reached his home very early one morning and was charged with "common thief." He was stopped by officers because he was traveling at a high rate of speed, yet no speeding charge was placed against him.

Brown was arrested when he was observed leaving a downtown Jacksonville hotel by a police officer seated in a cruiser. The police testified he was reputed to be a thief, narcotics pusher, and generally opprobrious character. The officer called Brown over to the car, intending at that time to arrest him unless he had a good explanation for being on the street. Brown walked over to the police cruiser, as commanded, and the officer began to search him, apparently preparatory to placing him in the car. In the process of the search he came on two small packets which were later found to contain heroin. When the officer touched the pocket where the packets were, Brown began to resist. He was charged with "disorderly loitering on street" and "dis-

orderly conduct—resisting arrest with violence." While he was also charged with a narcotics violation, that charge was *nolled.*

Jacksonville's ordinance and Florida's statute were "derived from early English law," *Johnson* v. *State,* 202 So. 2d, at 854, and employ "archaic language" in their definitions of vagrants. *Id.,* at 855. The history is an oftentold tale. The breakup of feudal estates in England led to labor shortages which in turn resulted in the Statutes of Laborers,[3] designed to stabilize the labor force by prohibiting increases in wages and prohibiting the movement of workers from their home areas in search of improved conditions. Later vagrancy laws became criminal aspects of the poor laws. The series of laws passed in England on the subject became increasingly severe.[4]

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[3] 23 Edw. 3, c. 1 (1349); 25 Edw. 3, c. 1 (1350).

[4] See 3 J. Stephen, History of the Criminal Law of England 203–206, 266–275; 4 W. Blackstone, Commentaries *169.

Ledwith v. *Roberts,* [1937] 1 K. B. 232, 271, gives the following summary:

"The early Vagrancy Acts came into being under peculiar conditions utterly different to those of the present time. From the time of the Black Death in the middle of the 14th century till the middle of the 17th century, and indeed, although in diminishing degree, right down to the reform of the Poor Law in the first half of the 19th century, the roads of England were crowded with masterless men and their families, who had lost their former employment through a variety of causes, had no means of livelihood and had taken to a vagrant life. The main causes were the gradual decay of the feudal system under which the labouring classes had been anchored to the soil, the economic slackening of the legal compulsion to work for fixed wages, the break up of the monasteries in the reign of Henry VIII, and the consequent disappearance of the religious orders which had previously administered a kind of 'public assistance' in the form of lodging, food and alms; and, lastly, the economic changes brought about by the Enclosure Acts. Some of these people were honest labourers who had fallen upon evil days, others were the 'wild rogues,' so common in Elizabethan times and literature, who had been born to a life of idleness and had no

But "the theory of the Elizabethan poor laws no longer fits the facts," *Edwards* v. *California*, 314 U. S. 160, 174. The conditions which spawned these laws may be gone, but the archaic classifications remain.

This ordinance is void for vagueness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States* v. *Harriss*, 347 U. S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. *Thornhill* v. *Alabama*, 310 U. S. 88; *Herndon* v. *Lowry*, 301 U. S. 242.

Living under a rule of law entails various suppositions, one of which is that "[all persons] are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453.

Lanzetta is one of a well-recognized group of cases insisting that the law give fair notice of the offending conduct. See *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81. In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed. *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337; *United States* v. *National Dairy Products Corp.*, 372 U. S. 29; *United States* v. *Petrillo*, 332 U. S. 1.

The poor among us, the minorities, the average householder are not in business and not alerted to the regula-

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intention of following any other. It was they and their confederates who formed themselves into the notorious 'brotherhood of beggars' which flourished in the 16th and 17th centuries. They were a definite and serious menace to the community and it was chiefly against them and their kind that the harsher provisions of the vagrancy laws of the period were directed."

And see Sherry, Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision, 48 Calif. L. Rev. 557, 560–561 (1960); Note, The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality, 37 N. Y. U. L. Rev. 102 (1962).

tory schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them. Nor are they protected from being caught in the vagrancy net by the necessity of having a specific intent to commit an unlawful act. See *Screws* v. *United States,* 325 U. S. 91; *Boyce Motor Lines, Inc.* v. *United States, supra.*

The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent. "Nightwalking" is one. Florida construes the ordinance not to make criminal one night's wandering, *Johnson* v. *State,* 202 So. 2d, at 855, only the "habitual" wanderer or, as the ordinance describes it, "common night walkers." We know, however, from experience that sleepless people often walk at night, perhaps hopeful that sleep-inducing relaxation will result.

Luis Munoz-Marin, former Governor of Puerto Rico, commented once that "loafing" was a national virtue in his Commonwealth and that it should be encouraged. It is, however, a crime in Jacksonville.

"[P]ersons able to work but habitually living upon the earnings of their wives or minor children"—like habitually living "without visible means of support"—might implicate unemployed pillars of the community who have married rich wives.

"[P]ersons able to work but habitually living upon the earnings of their wives or minor children" may also embrace unemployed people out of the labor market, by reason of a recession [5] or disemployed by reason of technological or so-called structural displacements.

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[5] In *Edwards* v. *California,* 314 U. S. 160, 177, in referring to *City of New York* v. *Miln,* 11 Pet. 102, 142, decided in 1837, we said: "Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous."

Persons "wandering or strolling" from place to place have been extolled by Walt Whitman and Vachel Lindsay.[6] The qualification "without any lawful purpose or object" may be a trap for innocent acts. Persons "neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served" would literally embrace many members of golf clubs and city clubs.

Walkers and strollers and wanderers may be going to or coming from a burglary. Loafers or loiterers may be "casing" a place for a holdup. Letting one's wife support him is an intra-family matter, and normally of no concern to the police. Yet it may, of course, be the setting for numerous crimes.

The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

They are embedded in Walt Whitman's writings, especially in his "Song of the Open Road." They are reflected, too, in the spirit of Vachel Lindsay's "I Want to Go Wandering," and by Henry D. Thoreau.[7]

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[6] And see Reich, Police Questioning of Law Abiding Citizens, 75 Yale L. J. 1161, 1172 (1966): "If I choose to take an evening walk to see if Andromeda has come up on schedule, I think I am entitled to look for the distant light of Almach and Mirach without finding myself staring into the blinding beam of a police flashlight."

[7] "I have met with but one or two persons in the course of my life who understood the art of Walking, that is, of taking walks,—who had a genius, so to speak, for *sauntering:* which word is beauti-

This aspect of the vagrancy ordinance before us is suggested by what this Court said in 1876 about a broad criminal statute enacted by Congress: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States* v. *Reese,* 92 U. S. 214, 221.

While that was a federal case, the due process implications are equally applicable to the States and to this vagrancy ordinance. Here the net cast is large, not to give the courts the power to pick and choose but to increase the arsenal of the police. In *Winters* v. *New York,* 333 U. S. 507, the Court struck down a New York statute that made criminal the distribution of a magazine made up principally of items of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes against the person. The infirmity the Court found was vagueness—the absence of "ascertainable standards of guilt" (*id.,* at 515) in the

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fully derived 'from idle people who roved about the country, in the Middle Ages, and asked charity, under pretence of going *à la Sainte Terre,*' to the Holy Land, till the children exclaimed, 'There goes a *Sainte Terrer,*' a Saunterer, a Holy-Lander. They who never go to the Holy Land in their walks, as they pretend, are indeed mere idlers and vagabonds; but they who do go there are saunterers in the good sense, such as I mean. Some, however, would derive the word from *sans terre,* without land or a home, which, therefore, in the good sense, will mean, having no particular home, but equally at home everywhere. For this is the secret of successful sauntering. He who sits still in a house all the time may be the greatest vagrant of all; but the saunterer, in the good sense, is no more vagrant than the meandering river, which is all the while sedulously seeking the shortest course to the sea. But I prefer the first, which, indeed, is the most probable derivation. For every walk is a sort of crusade, preached by some Peter the Hermit in us, to go forth and reconquer this Holy Land from the hands of the Infidels." Excursions 251–252 (1893).

sensitive First Amendment area.[8] Mr. Justice Frankfurter dissented. But concerned as he, and many others,[9] had been over the vagrancy laws, he added:

> "Only a word needs to be said regarding *Lanzetta* v. *New Jersey*, 306 U. S. 451. The case involved a New Jersey statute of the type that seek to control 'vagrancy.' These statutes are in a class by themselves, in view of the familiar abuses to which they are put. . . . Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided." *Id.*, at 540.

Where the list of crimes is so all-inclusive and generalized [10] as the one in this ordinance, those convicted

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[8] For a discussion of the void-for-vagueness doctrine in the area of fundamental rights see Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 104 *et seq.*; Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205, 224 *et seq.* (1967).

[9] See *Edelman* v. *California*, 344 U. S. 357, 362 (Black, J., dissenting); *Hicks* v. *District of Columbia*, 383 U. S. 252 (Douglas, J., dissenting); *District of Columbia* v. *Hunt*, 82 U. S. App. D. C. 159, 163 F. 2d 833 (Judge Stephens writing for a majority of the Court of Appeals); Judge Rudkin for the court in *Hawaii* v. *Anduha*, 48 F. 2d 171.

The opposing views are numerous: *Ex parte Branch*, 234 Mo. 466, 137 S. W. 886; H. R. Rep. No. 1248, 77th Cong., 1st Sess., 2; Perkins, The Vagrancy Concept, 9 Hastings L. J. 237 (1958); *People* v. *Craig*, 152 Cal. 42, 91 P. 997.

[10] President Roosevelt, in vetoing a vagrancy law for the District of Columbia, said:

"The bill contains many provisions that constitute an improvement

may be punished for no more than vindicating affronts to police authority:

> "The common ground which brings such a motley assortment of human troubles before the magistrates in vagrancy-type proceedings is the procedural laxity which permits 'conviction' for almost any kind of conduct and the existence of the House of Correction as an easy and convenient dumping-ground for prob-

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over existing law. Unfortunately, however, there are two provisions in the bill that appear objectionable.

"Section 1 of the bill contains a number of clauses defining a 'vagrant.' Clause 6 of this section would include within that category 'any able-bodied person who lives in idleness upon the wages, earnings, or property of any person having no legal obligation to support him.' This definition is so broadly and loosely drawn that in many cases it would make a vagrant of an adult daughter or son of a well-to-do family who, though amply provided for and not guilty of any improper or unlawful conduct, has no occupation and is dependent upon parental support.

"Under clause 9 of said section 'any person leading an idle life . . . and not giving a good account of himself' would incur guilt and liability to punishment unless he could prove, as required by section 2, that he has lawful means of support realized from a lawful occupation or source. What constitutes 'leading an idle life' and 'not giving a good account of oneself' is not indicated by the statute but is left to the determination in the first place of a police officer and eventually of a judge of the police court, subject to further review in proper cases. While this phraseology may be suitable for general purposes as a definition of a vagrant, it does not conform with accepted standards of legislative practice as a definition of a criminal offense. I am not willing to agree that a person without lawful means of support, temporarily or otherwise, should be subject to the risk of arrest and punishment under provisions as indefinite and uncertain in their meaning and application as those employed in this clause.

"It would hardly be a satisfactory answer to say that the sound judgment and decisions of the police and prosecuting officers must be trusted to invoke the law only in proper cases. The law itself should be so drawn as not to make it applicable to cases which obviously should not be comprised within its terms." H. R. Doc. No. 392, 77th Cong., 1st Sess.

lems that appear to have no other immediate solution." Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603, 631.[11]

Another aspect of the ordinance's vagueness appears when we focus, not on the lack of notice given a potential offender, but on the effect of the unfettered discretion it places in the hands of the Jacksonville police. Caleb Foote, an early student of this subject, has called the vagrancy-type law as offering "punishment by analogy." *Id.*, at 609. Such crimes, though long common in Russia,[12] are not compatible with our constitutional

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[11] Thus, "prowling by auto," which formed the basis for the vagrancy arrests and convictions of four of the petitioners herein, is not even listed in the ordinance as a crime. But see *Hanks* v. *State*, 195 So. 2d 49, 51, in which the Florida District Court of Appeal construed "wandering or strolling from place to place" as including travel by automobile.

[12] J. Hazard, The Soviet Legal System 133 (1962):

"The 1922 code was a step in the direction of precision in definition of crime, but it was not a complete departure from the concept of punishment in accordance with the dictates of the social consciousness of the judge. Laying hold of an old tsarist code provision that had been in effect from 1864 to 1903 known by the term 'analogy,' the Soviet draftsmen inserted an article permitting a judge to consider the social danger of an individual even when he had committed no act defined as a crime in the specialized part of the code. He was to be guided by analogizing the dangerous act to some act defined as crime, but at the outset the analogies were not always apparent, as when a husband was executed for the sadistic murder of a wife, followed by dissection of her torso and shipment in a trunk to a remote railway station, the court arguing that the crime was analogous to banditry. At the time of this decision the code permitted the death penalty for banditry but not for murder without political motives or very serious social consequences."

"On the traditionally important subject of criminal law, Algeria is rejecting the flexibility introduced in the Soviet criminal code by the 'analogy' principle, as have the East-Central European and black African states." Hazard, The Residue of Marxist Influence in Algeria, 9 Colum. J. of Transnat'l L. 194, 224 (1970).

system. We allow our police to make arrests only on "probable cause," [13] a Fourth and Fourteenth Amendment standard applicable to the States [14] as well as to the Federal Government. Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality. Future criminality, however, is the common justification for the presence of vagrancy statutes. See Foote, *supra,* at 625. Florida has, indeed, construed her vagrancy statute "as necessary regulations," *inter alia,* "to deter vagabondage and prevent crimes." *Johnson* v. *State,* 202 So. 2d 852; *Smith* v. *State,* 239 So. 2d 250, 251.

A direction by a legislature to the police to arrest all "suspicious" persons [15] would not pass constitutional muster. A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest. *People*

[13] *Johnson* v. *United States,* 333 U. S. 10, 15–17.

[14] *Whiteley* v. *Warden,* 401 U. S. 560.

[15] On arrests for investigation, see Secret Detention by the Chicago Police, A Report by the American Civil Liberties Union (1959). The table below contains nationwide data on arrests for "vagrancy" and for "suspicion" in the three-year period 1968–1970.

	Vagrancy		Suspicion		Combined Offenses	
Year*	Total rptd. arrests	Rate per 100,000	Total rptd. arrests	Rate per 100,000	Total rptd. arrests	Rate per 100,000
1968	99,147	68.2	89,986	61.9	189,133	130.1
1969	106,269	73.9	88,265	61.4	194,534	135.3
1970	101,093	66.7	70,173	46.3	171,266	113.0
3-year averages	102,170	69.6	82,808	56.5	184,978	126.1

*Reporting agencies represent population of: 1968—145,306,000; 1969—143,815,000; 1970—151,604,000.

Source: FBI Uniform Crime Reports, 1968–1970.

v. *Moss*, 309 N. Y. 429, 131 N. E. 2d 717. But as Chief Justice Hewart said in *Frederick Dean*, 18 Crim. App. 133, 134 (1924):

> "It would be in the highest degree unfortunate if in any part of the country those who are responsible for setting in motion the criminal law should entertain, connive at or coquette with the idea that in a case where there is not enough evidence to charge the prisoner with an attempt to commit a crime, the prosecution may, nevertheless, on such insufficient evidence, succeed in obtaining and upholding a conviction under the Vagrancy Act, 1824."

Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98. It results in a regime in which the poor and the unpopular are permitted to "stand on a public sidewalk . . . only at the whim of any police officer." *Shuttlesworth* v. *Birmingham*, 382 U. S. 87, 90. Under this ordinance,

> "[I]f some carefree type of fellow is satisfied to work just so much, and no more, as will pay for one square meal, some wine, and a flophouse daily, but a court thinks this kind of living subhuman, the fellow can be forced to raise his sights or go to jail as a vagrant." Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status,

Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205, 226 (1967).

A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.

The Jacksonville ordinance cannot be squared with our constitutional standards and is plainly unconstitutional.

Reversed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

SMITH ET AL. *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 70–5055. Argued December 8, 1971—
Decided February 24, 1972

Petitioners' convictions for violation of the Florida vagrancy statute for "wandering or strolling around from place to place without any lawful purpose or object" are vacated and the case is remanded for reconsideration in light of *Papachristou* v. *City of Jacksonville, ante,* p. 156. Pp. 172–173.

239 So. 2d 250, vacated and remanded.

DOUGLAS, J., delivered the opinion of the Court, in which all Justices joined, except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

Phillip A. Hubbart argued the cause and filed briefs for petitioners.

Nelson E. Bailey, Assistant Attorney General of Florida, argued the cause for respondent *pro hac vice.* With him on the brief was *Robert L. Shevin,* Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Florida's vagrancy statute [1] includes in the term "vagrants," who can be criminally charged and convicted, "persons wandering or strolling around from place to place without any lawful purpose or object." [2] The defendants were so charged and pleaded not guilty, waived trial by jury, and were tried by a judge, who denied a motion to dismiss. The Florida Supreme Court affirmed, two judges dissenting. 239 So. 2d 250. The

[1] Fla. Stat. § 856.02 (1965). See *Papachristou* v. *City of Jacksonville,* decided this day, *ante,* at 157 n. 2.

[2] § 856.02.

case is here on a petition for a writ of certiorari which we granted. 403 U. S. 917.

We have this day decided *Papachristou* v. *City of Jacksonville, ante,* p. 156. We therefore vacate and remand the judgment in the instant case for reconsideration in light of *Papachristou.*

So ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

D. H. OVERMYER CO., INC., OF OHIO ET AL. *v.* FRICK CO.

CERTIORARI TO THE COURT OF APPEALS OF OHIO, LUCAS COUNTY

No. 69–5. Argued November 9, 1971—Decided February 24, 1972

After a corporation (Overmyer) had defaulted in its payments for equipment manufactured and being installed by respondent company (Frick), and Overmyer under a post-contract arrangement had made a partial cash payment and issued an installment note for the balance, Frick completed the work, which Overmyer accepted as satisfactory. Thereafter Overmyer again asked for relief and, with counsel for both corporations participating in the negotiations, the first note was replaced with a second, which contained a "cognovit" provision in conformity with Ohio law at that time whereby Overmyer consented in advance, should it default in interest or principal payments, to Frick's obtaining a judgment without notice or hearing, and issued certain second mortgages in Frick's favor, Frick agreeing to release three mechanic's liens, to reduce the monthly payment amounts and interest rate, and to extend the time for final payment. When Overmyer, claiming a contract breach, stopped making payments on the new note, Frick, under the cognovit provision, through an attorney unknown to but on behalf of Overmyer, and without personal service on or prior notice to Overmyer, caused judgment to be entered on the note. Overmyer's motion to vacate the judgment was overruled after a post-judgment hearing, and the judgment court's decision was affirmed on appeal against Overmyer's contention that the cognovit procedure violated due process requirements. *Held:* Overmyer, for consideration and with full awareness of the legal consequences, waived its rights to prejudgment notice and hearing, and on the facts of this case, which involved contractual arrangements between two corporations acting with advice of counsel, the procedure under the cognovit clause (which is not unconstitutional *per se*) did not violate Overmyer's Fourteenth Amendment rights. Pp. 182–188.

Affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which all Members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case. DOUGLAS, J.,

filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 188.

Russell Morton Brown argued the cause and filed a brief for petitioners.

Gregory M. Harvey argued the cause for respondent. With him on the brief was *James M. Tuschman*.

Franklin A. Martens filed a brief for the Ohio State Legal Services Assn. et al. as *amici curiae* urging reversal.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue of the constitutionality, under the Due Process Clause of the Fourteenth Amendment, of the cognovit note authorized by Ohio Rev. Code § 2323.13. [1]

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[1] When the judgment challenged here was entered in 1968 the statute read:

"Sec. 2323.13. (A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.

"(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

"(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition."

Senate Bill No. 85, 133 Ohio Laws 196–198 (1969–1970), effective Sept. 16, 1970, amended paragraphs (A) and (C), in ways not pertinent here, and added paragraph (D):

"(D) A warrant of attorney to confess judgment contained in any promissory note, bond, security agreement, lease, contract, or other

The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder.[2] It was known at least as far back as Blackstone's time. 3 W. Blackstone, Commentaries *397.[3] In a case applying Ohio law, it was

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evidence of indebtedness executed on or after January 1, 1971, is invalid and the courts are without authority to render a judgment based upon such a warrant unless there appears on the instrument evidencing the indebtedness, directly above or below the signature of each maker, or other person authorizing the confession, in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document:

" 'Warning—By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you or your employer regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause.' "

[2] The Iowa Supreme Court succinctly has defined a cognovit as "the written authority of the debtor and his direction . . . to enter judgment against him as stated therein." *Blott* v. *Blott*, 227 Iowa 1108, 1111–1112, 290 N. W. 74, 76 (1940).

In *Jones* v. *John Hancock Mutual Life Insurance Co.*, 289 F. Supp. 930, 935 (WD Mich. 1968), aff'd, 416 F. 2d 829 (CA6 1969), Judge Fox, in applying Ohio law, pertinently observed:

"A cognovit note is not an ordinary note. It is indeed an extraordinary note which authorizes an attorney to confess judgment against the person or persons signing it. It is written authority of a debtor and a direction by him for the entry of a judgment against him if the obligation set forth in the note is not paid when due. Such a judgment may be taken by any person or any company holding the note, and it cuts off every defense which the maker of the note may otherwise have. It likewise cuts off all rights of appeal from any judgment taken on it."

[3] Historical references appear in *General Contract Purchase Corp.* v. *Max Keil Real Estate Co.*, 35 Del. 531, 532–533, 170 A. 797, 798 (1933), and *First Nat. Bk.* v. *White*, 220 Mo. 717, 728–732, 120 S. W. 36, 39–40 (1909).

said that the purpose of the cognovit is "to permit the note holder to obtain judgment without a trial of possible defenses which the signers of the notes might assert." *Hadden* v. *Rumsey Products, Inc.*, 196 F. 2d 92, 96 (CA2 1952). And long ago the cognovit method was described by the Chief Justice of New Jersey as "the loosest way of binding a man's property that ever was devised in any civilized country." *Alderman* v. *Diament*, 7 N. J. L. 197, 198 (1824). Mr. Dickens noted it with obvious disfavor. Pickwick Papers, c. 47. The cognovit has been the subject of comment, much of it critical.[4]

Statutory treatment varies widely. Some States specifically authorize the cognovit.[5] Others disallow it.[6]

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[4] Recent Cases, Confession of Judgments—Refusal of New York State to Enforce Pennsylvania Cognovit Judgments, 74 Dick. L. Rev. 750 (1970); Note, Enforcement of Sister State's Cognovit Judgments, 16 Wayne L. Rev. 1181 (1970); H. Goodrich, Conflict of Laws § 73, p. 122 (4th ed. 1964); Hopson, Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit, 29 U. Chi. L. Rev. 111 (1961); Hunter, The Warrant of Attorney to Confess Judgment, 8 Ohio St. L. J. 1 (1941); Note, A Clash in Ohio?: Cognovit Notes and the Business Ethic of the UCC, 35 U. Cin. L. Rev. 470 (1966); Comment, The Effect of Full Faith and Credit on Cognovit Judgments, 42 U. Colo. L. Rev. 173 (1970); Comment, Confessions of Judgment: The Due Process Defects, 43 Temp. L. Q. 279 (1970); Comment, Cognovit Judgments and the Full Faith and Credit Clause, 50 B. U. L. Rev. 330 (1970); Comment, Cognovit Judgments: Some Constitutional Considerations, 70 Col. L. Rev. 1118 (1970); Note, Confessions of Judgment, 102 U. Pa. L. Rev. 524 (1954); Note, Foreign Courts May Deny Full Faith and Credit to Cognovit Judgments and Must Do So When Entered Pursuant to an Unlimited Warrant of Attorney, 56 Va. L. Rev. 554 (1970); Note, Should a Cognovit Judgment Validly Entered in One State be Recognized by a Sister State?, 30 Md. L. Rev. 350 (1970).

[5] Ill. Rev. Stat., c. 110, § 50; Mo. Rev. Stat. § 511.100; Ohio Rev. Code § 2323.13; Pa. Stat. Ann., Tit. 12, §§ 738 and 739 and Pa. Rules of Civil Procedure 2950–2976; S. D. Comp. Laws § 21–26–1.

[6] See, for example, Ala. Code, Tit. 20, § 16, and Tit. 62, § 248;

Some go so far as to make its employment a misdemeanor.[7] The majority, however, regulate its use and many prohibit the device in small loans and consumer sales.[8]

In Ohio the cognovit has long been recognized by both statute and court decision. 1 Chase's Statutes, c. 243, § 34 (1810); *Osborn* v. *Hawley*, 19 Ohio 130 (1850); *Marsden* v. *Soper*, 11 Ohio St. 503 (1860); *Watson* v. *Paine*, 25 Ohio St. 340 (1874); *Clements* v. *Hull*, 35 Ohio St. 141 (1878). The State's courts, however, give the instrument a strict and limited construction. See *Peoples Banking Co.* v. *Brumfield Hay & Grain Co.*, 172 Ohio St. 545, 548, 179 N. E. 2d 53, 55 (1961).

This Court apparently has decided only two cases concerning cognovit notes, and both have come here in a full faith and credit context. *National Exchange Bank* v. *Wiley*, 195 U. S. 257 (1904); *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, 137 U. S. 287 (1890). See *American Surety Co.* v. *Baldwin*, 287 U. S. 156 (1932).

I

The argument that a provision of this kind is offensive to current notions of Fourteenth Amendment due process is, at first glance, an appealing one. However, here, as in nearly every case, facts are important. We state them chronologically:

1. Petitioners D. H. Overmyer Co., Inc., of Ohio, and D. H. Overmyer Co., Inc., of Kentucky, are segments of a warehousing enterprise that counsel at one point in

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Ariz. Rev. Stat. Ann. §§ 6–629 and 44–143; Mass. Gen. Laws Ann., c. 231, § 13A.

[7] Ind. Ann. Stat. §§ 2–2904 and 2–2906; N. M. Stat. Ann. §§ 21–9–16 and 21–9–18; R. I. Gen. Laws Ann. §§ 19–25–24 and 19–25–36.

[8] See, for example, Conn. Gen. Stat. Rev. §§ 42–88 and 36–236; Mich. Comp. Laws §§ 600.2906 and 493.12, Mich. Stat. Ann. §§ 27A.-2906 and 23.667 (12); Minn. Stat. §§ 548.22, 168.71, and 56.12; N. J. Stat. Ann. § 2A:16–9.

the litigation described as having built "in three years . . . 180 warehouses in thirty states." The corporate structure is complex. Because the identity and individuality of the respective corporate entities are not relevant here, we refer to the enterprise in the aggregate as "Overmyer."

2. In 1966 a corporation, which then was or at a later date became an Overmyer affiliate, executed a contract with the respondent Frick Co. for the manufacture and installation by Frick, at a cost of $223,000, of an automatic refrigeration system in a warehouse under construction in Toledo, Ohio.

3. Overmyer fell behind in the progress payments due from it under the contract. By the end of September 1966 approximately $120,000 was overdue. Because of this delinquency, Frick stopped its work on October 10. Frick indicated to Overmyer, however, by letter on that date, its willingness to accept an offer from Overmyer to pay $35,000 in cash "provided the balance can be evidenced by interest-bearing judgment notes."

4. On November 3 Frick filed three mechanic's liens against the Toledo property for a total of $194,031, the amount of the contract price allegedly unpaid at that time.

5. The parties continued to negotiate. In January 1967 Frick, in accommodation, agreed to complete the work upon an immediate cash payment of 10% ($19,403.10) and payment of the balance of $174,627.90 in 12 equal monthly installments with 6½% interest per annum. On February 17 Overmyer made the 10% payment and executed an installment note calling for 12 monthly payments of $15,498.23 each beginning March 1, 1967. This note contained no confession-of-judgment provision. It recited that it did not operate as a waiver of the mechanic's liens, but it also stated that Frick would forgo enforcement of those lien rights so long as there was no default under the note.

6. Frick resumed its work, completed it, and sent Overmyer a notice of completion. On March 17 Overmyer's vice president acknowledged in writing that the system had been "completed in a satisfactory manner" and that it was "accepted as per the contract conditions."

7. Subsequently, Overmyer requested additional time to make the installment payments. It also asked that Frick release the mechanic's liens against the Toledo property. Negotiations between the parties at that time finally resulted in an agreement in June 1967 that (a) Overmyer would execute a new note for the then-outstanding balance of $130,997 and calling for payment of that amount in 21 equal monthly installments of $6,891.85 each, beginning June 1, 1967, and ending in February 1969, two years after Frick's completion of the work (as contrasted with the $15,498.23 monthly installments ending February 1968 specified by the first note); (b) the interest rate would be 6% rather than 6½%; (c) Frick would release the three mechanic's liens; (d) Overmyer would execute second mortgages, with Frick as mortgagee, on property in Tampa and Louisville; and (e) Overmyer's new note would contain a confession-of-judgment clause. The new note, signed in Ohio by the two petitioners here, was delivered to Frick some months later by letter dated October 2, 1967, accompanied by five checks for the June through October payments. This letter was from Overmyer's general counsel to Frick's counsel. The second mortgages were executed and recorded, and the mechanic's liens were released. The note contained the following judgment clause:

> "The undersigned hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this issuance and service of process, and confess a judg-

ment against the undersigned in favor of the Holder of this Note, for the principal of this Note plus interest if the undersigned defaults in any payment of principal and interest and if said default shall continue for the period of fifteen (15) days."

8. On June 1, 1968, Overmyer ceased making the monthly payments under the new note and, asserting a breach by Frick of the original contract, proceeded to institute a diversity action against Frick in the United States District Court for the Southern District of New York. Overmyer sought damages in excess of $170,000 and a stay of all proceedings by Frick under the note. On July 5 Judge Frankel vacated an *ex parte* stay he had theretofore granted. On August 7 Judge Mansfield denied Overmyer's motion for reinstatement of the stay. He concluded, "Plaintiff has failed to show any likelihood that it will prevail upon the merits. On the contrary, extensive documentary evidence furnished by defendant indicates that the plaintiff's action lacks merit."

9. On July 12, without prior notice to Overmyer, Frick caused judgment to be entered against Overmyer (specifically against the two petitioners here) in the Common Pleas Court of Lucas County, Ohio. The judgment amount was the balance then remaining on the note, namely, $62,370, plus interest from May 1, 1968, and costs. This judgment was effected through the appearance of an Ohio attorney on behalf of the defendants (petitioners here) in that Ohio action. His appearance was "by virtue of the warrant of attorney" in the second note. The lawyer waived the issuance and service of process and confessed the judgment. This attorney was not known to Overmyer, had not been retained by Overmyer, and had not communicated with the petitioners prior to the entry of the judgment.

10. As required by Ohio Rev. Code § 2323.13 (C), the clerk of the state court, on July 16, mailed notices of the entry of the judgment on the cognovit note to Overmyer at addresses in New York, Ohio, and Kentucky.

11. On July 22 Overmyer, by counsel, filed in the Ohio court motions to stay execution and for a new trial. The latter motion referred to "[i]rregularity in the proceedings of the prevailing party and of the court . . . ." On August 6, Overmyer filed a motion to vacate judgment and tendered an answer and counterclaim alleging breach of contract by Frick, and damages. A hearing was held. Both sides submitted affidavits. Those submitted by Overmyer asserted lack of notice before judgment and alleged a breach of contract by Frick. A copy of Judge Mansfield's findings, conclusions, and opinion was placed in the record. On November 16 the court overruled each motion.

12. Overmyer appealed to the Court of Appeals for Lucas County, Ohio, specifically asserting deprivation of due process violative of the Ohio and Federal Constitutions. That court affirmed with a brief journal entry.

13. The Supreme Court of Ohio "sua sponte dismisse[d] the appeal for the reason that no substantial constitutional question exists herein."

We granted certiorari. 401 U. S. 992 (1971).

II

This chronology clearly reveals that Overmyer's situation, of which it now complains, is one brought about largely by its own misfortune and failure or inability to pay. The initial agreement between Overmyer and Frick was a routine construction subcontract. Frick agreed to do the work and Overmyer agreed to pay a designated amount for that work by progress payments at specified times. This contract was not accompanied by any promissory note.

Overmyer then became delinquent in its payments. Frick naturally refrained from further work. This impasse was resolved by the February 1967 post-contract arrangement, pursuant to which Overmyer made an immediate partial payment in cash and issued its installment note for the balance. Although Frick had suggested a confession-of-judgment clause, the note as executed and delivered contained no provision of that kind.

Frick completed its work and Overmyer accepted the work as satisfactory. Thereafter Overmyer again asked for relief. At this time counsel for each side participated in the negotiations. The first note was replaced by the second. The latter contained the confession-of-judgment provision Overmyer now finds so offensive. However, in exchange for that provision and for its execution of the second mortgages, Overmyer received benefit and consideration in the form of (a) Frick's release of the three mechanic's liens, (b) reduction in the amount of the monthly payment, (c) further time in which the total amount was to be paid, and (d) reduction of a half point in the interest rate.

Were we concerned here only with the validity of the June 1967 agreement under principles of contract law, that issue would be readily resolved. Obviously and undeniably, Overmyer's execution and delivery of the second note were for an adequate consideration and were the product of negotiations carried on by corporate parties with the advice of competent counsel.

More than mere contract law, however, is involved here.

III

Petitioner Overmyer first asserts that the Ohio judgment is invalid because there was no personal service upon it, no voluntary appearance by it in Ohio, and no genuine appearance by an attorney on its behalf. Thus,

it is said, there was no personal jurisdiction over Overmyer in the Ohio proceeding. The petitioner invokes *Pennoyer* v. *Neff*, 95 U. S. 714, 732 (1878), and other cases decided here and by the Ohio courts enunciating accepted and long-established principles for *in personam* jurisdiction. *McDonald* v. *Mabee*, 243 U. S. 90, 91 (1917); *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, 418 (1957); *Sears* v. *Weimer*, 143 Ohio St. 312, 55 N. E. 2d 413 (1944); *Railroad Co.* v. *Goodman*, 57 Ohio St. 641, 50 N. E. 1132 (1897); *Cleveland Leader Printing Co.* v. *Green*, 52 Ohio St. 487, 491, 40 N. E. 201, 203 (1895).

It is further said that whether a defendant's appearance is voluntary is to be determined at the time of the court proceeding, not at a much earlier date when an agreement was signed; that an unauthorized appearance by an attorney on a defendant's behalf cannot confer jurisdiction; and that the lawyer who appeared in Ohio was not Overmyer's attorney in any sense of the word, but was only an agent of Frick.

The argument then proceeds to constitutional grounds. It is said that due process requires reasonable notice and an opportunity to be heard, citing *Boddie* v. *Connecticut*, 401 U. S. 371, 378 (1971). It is acknowledged, however, that the question here is in a context of "contract waiver, before suit has been filed, before any dispute has arisen" and "whereby a party gives up in advance his constitutional right to defend any suit by the other, to notice and an opportunity to be heard, no matter what defenses he may have, and to be represented by counsel of his own choice." [9] In other words, Overmyer's position here specifically is that it is "unconstitutional to waive in advance the right to present a defense in an action on the note." [10] It is conceded that in Ohio a court has the

[9] Brief for Petitioners 16.

[10] Tr. of Oral Arg. 17.

power to open the judgment upon a proper showing. *Bellows* v. *Bowlus*, 83 Ohio App. 90, 93, 82 N. E. 2d 429, 432 (1948). But it is claimed that such a move is discretionary and ordinarily will not be disturbed on appeal, and that it may not prevent execution before the debtor has notice, *Griffin* v. *Griffin*, 327 U. S. 220, 231–232 (1946). *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), and *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), are cited.

The due process rights to notice and hearing prior to a civil judgment are subject to waiver. In *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U. S. 311 (1964), the Court observed:

> "[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." *Id.*, at 315–316.

And in *Boddie* v. *Connecticut*, *supra*, the Court acknowledged that "the hearing required by due process is subject to waiver." 401 U. S., at 378–379.

This, of course, parallels the recognition of waiver in the criminal context where personal liberty, rather than a property right, is involved. *Illinois* v. *Allen*, 397 U. S. 337, 342–343 (1970) (right to be present at trial); *Miranda* v. *Arizona*, 384 U. S. 436, 444 (1966) (rights to counsel and against compulsory self-incrimination); *Fay* v. *Noia*, 372 U. S. 391, 439 (1963) (habeas corpus); *Rogers* v. *United States*, 340 U. S. 367, 371 (1951) (right against compulsory self-incrimination).

Even if, for present purposes, we assume that the standard for waiver in a corporate-property-right case of this kind is the same standard applicable to waiver in a criminal proceeding, that is, that it be voluntary, knowing, and intelligently made, *Brady* v. *United States*, 397

U. S. 742, 748 (1970); *Miranda* v. *Arizona*, 384 U. S., at 444, or "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938); *Fay* v. *Noia*, 372 U. S., at 439, and even if, as the Court has said in the civil area, "[w]e do not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, 307 (1937), that standard was fully satisfied here.

Overmyer is a corporation. Its corporate structure is complicated. Its activities are widespread. As its counsel in the Ohio post-judgment proceeding stated, it has built many warehouses in many States and has been party to "tens of thousands of contracts with many contractors." This is not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion. There was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed to a cognovit. The initial contract between the two corporations contained no confession-of-judgment clause. When, later, the first installment note from Overmyer came into being, it, too, contained no provision of that kind. It was only after Frick's work was completed and accepted by Overmyer, and when Overmyer again became delinquent in its payments on the matured claim and asked for further relief, that the second note containing the clause was executed.

Overmyer does not contend here that it or its counsel was not aware of the significance of the note and of the cognovit provision. Indeed, it could not do so in the light of the facts. Frick had suggested the provision in October 1966, but the first note, readjusting the progress payments, was executed without it. It appeared in the second note delivered by Overmyer's own counsel in return for substantial benefits and consideration to Overmyer. Particularly important, it would seem, was the

release of Frick's mechanic's liens, but there were, in addition, the monetary relief as to amount, time, and interest rate.

Overmyer may not have been able to predict with accuracy just how or when Frick would proceed under the confession clause if further default by Overmyer occurred, as it did, but this inability does not in itself militate against effective waiver. See *Brady* v. *United States,* 397 U. S., at 757; *McMann* v. *Richardson,* 397 U. S. 759, 772–773 (1970).

We therefore hold that Overmyer, in its execution and delivery to Frick of the second installment note containing the cognovit provision, voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences.

Insurance Co. v. *Morse,* 20 Wall. 445 (1874), affords no comfort to the petitioners. That case concerned the constitutional validity of a state statute that required a foreign insurance company, desiring to qualify in the State, to agree not to remove any suit against it to a federal court. The Court quite naturally struck down the statute, for it thwarted the authority vested by Congress in the federal courts and violated the Privileges and Immunities Clause.

Myers v. *Jenkins,* 63 Ohio St. 101, 120, 57 N. E. 1089, 1093 (1900), involving an insurance contract that called for adjustment of claims through the company alone and without resort to the courts, is similarly unhelpful.

IV

Some concluding comments are in order:

1. Our holding necessarily means that a cognovit clause is not, *per se,* violative of Fourteenth Amendment due process. Overmyer could prevail here only if the clause were constitutionally invalid. The facts of this case, as

we observed above, are important, and those facts amply demonstrate that a cognovit provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack.

2. Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.

3. Overmyer, merely because of its execution of the cognovit note, is not rendered defenseless. It concedes that in Ohio the judgment court may vacate its judgment upon a showing of a valid defense and, indeed, Overmyer had a post-judgment hearing in the Ohio court. If there were defenses such as prior payment or mistaken identity, those defenses could be asserted. And there is nothing we see that prevented Overmyer from pursuing its breach-of-contract claim against Frick in a proper forum. Here, again, that is precisely what Overmyer has attempted to do, thus far unsuccessfully, in the Southern District of New York.

The judgment is

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE MARSHALL joins, concurring.

I agree that the heavy burden against the waiver of constitutional rights, which applies even in civil matters, *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, 307 (1937); *Aetna Ins. Co.* v. *Kennedy*, 301 U. S.

389, 393 (1937), has been effectively rebutted by the evidence presented in this record. Whatever procedural hardship the Ohio confession-of-judgment scheme worked upon the petitioners was voluntarily and understandingly self-inflicted through the arm's-length bargaining of these corporate parties.

I add a word concerning the contention that opening of confessed judgments in Ohio is merely discretionary and requires a higher burden of persuasion than is ordinarily imposed upon defendants. As I read the Ohio law of cognovit notes, trial judges have traditionally enjoyed wide discretion in vacating confessed judgments. 32 Ohio Jur. 2d, Judgments § 558 (1958). In *Livingstone* v. *Rebman,* 169 Ohio St. 109, 158 N. E. 2d 366 (1959), however, the Ohio Supreme Court imposed certain safeguards on the exercise of a judge's discretion in opening confessed judgments. That case also involved a petition to open a confessed judgment where, as here, the debtor alleged the affirmative defense of failure of consideration. Using the preponderance-of-the-evidence test, the trial court had found insufficient support for the debtor's claim and had dismissed the motion to open. On appeal, however, the Ohio Supreme Court reversed on the degree of proof needed to vacate a confessed judgment. Said the court:

> "[I]f there is credible evidence supporting the defense . . . from which reasonable minds may reach different conclusions, it is then the *duty* of the court to suspend the judgment and permit the issue raised by the pleadings to be tried by a jury or, if a jury is waived, by the court." *Id.,* at 121–122, 158 N. E. 2d, at 375. (Emphasis supplied.)

Thus it would appear that the Ohio confessed judgment may be opened if the debtor poses a jury question, that

is, if his evidence would have been sufficient to prevent a directed verdict against him. That standard is a minimal obstacle.*

The fact that a trial judge is *dutybound* to vacate judgments obtained through cognovit clauses where debtors present jury questions is a complete answer to the contention that unbridled discretion governs the disposition of petitions to vacate. See also *Goodyear* v. *Stone,* 169 Ohio St. 124, 158 N. E. 2d 376 (1959); *McMillen* v. *Willard Garage Inc.,* 14 Ohio App. 2d 112, 115, 237 N. E. 2d 155, 158 (1968); *Central National Bank of Cleveland* v. *Standard Loan & Finance,* 5 Ohio App. 2d 101, 104, 195 N. E. 2d 597, 600 (1964).

The record shows that the petitioners were given every opportunity after judgment to explain their affirmative defense to the state courts and that the defense was rejected solely because the evidence adduced in support thereof was too thin to warrant further presentation to a jury.

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*Thus the Ohio system places no undue burden of proof upon the debtor desiring to open a confessed judgment, in marked contrast to the Pennsylvania procedure involved in *Swarb* v. *Lennox, post,* p. 191. In Pennsylvania, in order to vacate such a judgment, a borrower must prove his defense by the preponderance of the evidence rather than by merely mustering enough evidence to present a jury question. Once the judgment is vacated, moreover, he must again prevail by that standard at a subsequent trial. In effect, the Pennsylvania confessed debtor is required to win two consecutive trials, not simply one. Given the proclivities of reasonable men to differ over the probative value of jury questions, the Pennsylvania requirement of twice sustaining the preponderance of the evidence imposes a stiffer burden of persuasion.

SWARB ET AL. *v.* LENNOX ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 70–6. Argued November 9, 1971—Decided February 24, 1972

Appellants (hereafter plaintiffs), purporting to act on behalf of a class consisting of all Pennsylvania residents who signed documents containing cognovit provisions leading, or that could lead, to confessed judgments in Philadelphia, brought this action challenging the Pennsylvania system as unconstitutional on its face as violative of due process. The three-judge District Court held that: the Pennsylvania system leading to confessed judgments and execution complies with due process only if "there has been an understanding and voluntary consent of the debtor in signing the document"; plaintiffs did not sustain their burden of proof with respect to lack of valid consent in the execution of bonds and warrants of attorney accompanying mortgages; the record did not establish that the action could be maintained on behalf of natural persons with incomes over $10,000, but an action could be maintained for those who earn less than $10,000 and who signed consumer financing or lease contracts containing cognovit provisions; there was no intentional waiver of known rights by members of that class in executing confession-of-judgment clauses; and no judgment by confession might be entered after November 1, 1970, as to a member of the recognized class unless it is shown that the debtor "intentionally, understandingly, and voluntarily waived" his rights; and the court declared the Pennsylvania practice of confessing judgments to be unconstitutional, prospectively effective as noted, as applied to the designated class, and enjoined entry of any confessed judgment against a member of the class absent a showing of the required waiver. The plaintiffs appealed, claiming that the entire Pennsylvania scheme is unconstitutional on its face. *Held:*

1. The Pennsylvania rules and statutes relating to cognovit provisions are not unconstitutional on their face, as under appropriate circumstances, a cognovit debtor may be held effectively and legally to have waived the rights he would possess if the document he signed had contained no cognovit provision. *D. H. Overmyer Co.* v. *Frick Co., ante,* p. 174. P. 200.

2. In light of the fact that the named defendants and the intervenors have taken no cross appeal, the affirmance of the judgment

below does not mean that the District Court's opinion and judgment are approved as to other aspects and details that were not before this Court. P. 201.

314 F. Supp. 1091, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 202. DOUGLAS, J., filed an opinion dissenting in part, *post*, p. 203. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

David A. Scholl argued the cause for appellants *pro hac vice*. With him on the briefs was *Harvey N. Schmidt*.

Philip C. Patterson argued the cause for appellees. With him on the brief for appellees Middle Atlantic Finance Assn. et al. was *Marvin Comisky*. *J. Shane Creamer*, Attorney General, and *Barry A. Roth*, Assistant Deputy Attorney General, filed a brief for appellee the Commonwealth of Pennsylvania.

William L. Matz argued the cause for the Pennsylvania Savings & Loan League as *amicus curiae* urging affirmance. With him on the brief was *Herbert Bass*.

Briefs of *amici curiae* urging reversal were filed by *Don B. Kates, Jr.*, *Martin R. Glick*, and *Carol Ruth Silver* for California Rural Legal Assistance et al.; by *John J. Brennan* and *Gordon W. Gerber* for the Pennsylvania Bankers Assn.; by *David M. Jones* for the Pennsylvania Credit Union League; and by *Edward Donald Foster* and *Blair C. Shick* for the National Consumer Law Center.

Briefs of *amici curiae* urging affirmance were filed by *Matthew Hale* for the American Bankers Assn., and by *Gilbert Nurick* and *Moses K. Rosenberg* for the Pennsylvania Land Title Assn.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This appeal, heard as a companion to *D. H. Overmyer Co.* v. *Frick Co., ante,* p. 174, decided today, also purports to raise for the Court the issue of the due process validity of cognovit provisions. The system under challenge in this case is that of Pennsylvania.[1] The three-judge District Court, with one judge dissenting in part because, in his view, the court did not go far enough, refrained from declaring the Commonwealth's rules and statutes unconstitutional on their face and granted declaratory and injunctive relief only for a limited class of cognovit signers. 314 F. Supp. 1091 (ED Pa. 1970). The plaintiffs, but not the defendants, appealed. We noted probable jurisdiction the same day certiorari was granted in *Overmyer.* 401 U. S. 991.

I

The cognovit system is firmly entrenched in Pennsylvania and has long been in effect there.

A confession of judgment for money "may be entered by the prothonotary . . . without the agency of an attorney and without the filing of a complaint, declaration or confession, for the amount which may appear to be due from the face of the instrument," Pa. Rule Civ. Proc. 2951 (a), except that the action must be instituted by a complaint if the instrument is more than 10 years

[1] Pa. Rules Civ. Proc. 2950–2976, effective Jan. 1, 1970 (which, by the Act of June 21, 1937, Pa. Laws 1982, have the effect of state statutes); Act of Apr. 14, 1834, Pa. Stat. Ann., Tit. 17, § 1482 III; Act of Feb. 24, 1806, Pa. Stat. Ann., Tit. 12, § 739; Act of Mar. 21, 1806, Pa. Stat. Ann., Tit. 12, § 738. By Rule 2976, Pa. Stat. Ann., Tit. 12, § 739 is suspended "only insofar as it may be inconsistent with these rules," and Pa. Stat. Ann., Tit. 12, § 738 is suspended in its application to actions to confess judgment for money or for possession of real property.

old or cannot be produced for filing, "or if it requires the occurrence of a default or condition precedent before judgment may be entered." Rules 2951 (c) and (d). In an action instituted by a complaint, the plaintiff shall file a confession of judgment substantially in a prescribed form, and the attorney for the plaintiff "may sign the confession as attorney for the defendant" unless a statute or the instrument provides otherwise. Rule 2955. The prothonotary enters judgment "in conformity with the confession." Rule 2956.[2] The amount due, interest, attorneys' fees, and costs may be included by the plaintiff in the praecipe for a writ of execution. Rule 2957.

Within 20 days after the entry of judgment the plaintiff shall mail the defendant written notice. Failure to do this, however, does not affect the judgment lien. Rule 2958 (a). Within the same 20 days the plaintiff may issue a writ of execution and may do so even if the notice is not yet mailed. Rule 2958 (b). If an affidavit of mailing is not filed within the 20-day period, the writ of execution may not issue until 20 days after the affidavit of mailing has been filed. Rule 2958 (c).

Relief from a judgment by confession may be sought by a petition asserting "[a]ll grounds for relief whether to strike off the judgment or to open it . . . ." Rule 2959 (a). If the petition states prima facie grounds for relief, the court issues a rule to show cause and may grant a stay. A defendant "waives all defenses and objections" not included in the petition. The court "shall dispose of the rule on petition and answer, and on any testimony, depositions, admissions and other evidence." Rules 2959 (b), (c), and (e). If the judgment is opened in whole or in part, the issues are then tried. Rule 2960.

[2] Prior to the effective date of Rules 2950–2976, Pa. Stat. Ann., Tit. 12, § 738 provided that it "shall be the duty" of the prothonotary to enter an application and "on confession in writing . . . he shall enter judgment . . . ."

The procedure for confession of judgment for possession of real property is essentially the same except that the action shall be commenced by filing a complaint. Rules 2970–2973.

The prothonotary specifically is given power to "enter judgments at the instance of plaintiffs, upon the confessions of defendants." Pa. Stat. Ann., Tit. 17, § 1482. The prothonotary is the clerk of the court of common pleas. He has no judicial function. It has been said that his power is derived from the instrument under which he acts and not from his office, *Smith* v. *Safeguard Mut. Ins. Co.*, 212 Pa. Super. 83, 87, 239 A. 2d 824, 826 (1968), and that his entry of judgment is a ministerial act, *Lenson* v. *Sandler*, 430 Pa. 193, 197, 241 A. 2d 66, 68 (1968).

It has also been said that the confession of judgment procedure in Pennsylvania exists "independent of statute." *Equipment Corp. of America* v. *Primos Vanadium Co.*, 285 Pa. 432, 437, 132 A. 360, 362 (1926); *Cook* v. *Gilbert*, 8 Serg. & R. 567, 568 (1822); *Hatch* v. *Stitt*, 66 Pa. 264 (1870).

It is apparent, therefore, that in Pennsylvania confession-of-judgment provisions are given full procedural effect; that the plaintiff's attorney himself may effectuate the entire procedure; that the prothonotary, a nonjudicial officer, is the official utilized; that notice issues after the judgment is entered; and that execution upon the confessed judgment may be taken forthwith. The defendant may seek relief by way of a petition to strike the judgment or to open it, but he must assert prima facie grounds for this relief, and he achieves a trial only if he persuades the court to open. Meanwhile, the judgment and its lien remain.

The pervasive and drastic character of the Pennsylvania system has been noted. *Cutler Corp.* v. *Latshaw*, 374 Pa. 1, 4–5, 97 A. 2d 234, 236 (1953). See *Kine* v. *Forman*,

404 Pa. 301, 172 A. 2d 164 (1961), and *Atlas Credit Corp.* v. *Ezrine*, 25 N. Y. 2d 219, 250 N. E. 2d 474 (1969).

II

Seven individuals are the named plaintiffs in the original complaint filed in December 1969. Jurisdiction is based on the civil rights statutes, 28 U. S. C. § 1343 and 42 U. S. C. § 1983. The plaintiffs purport to act on behalf of a class consisting of all Pennsylvania residents who have signed documents containing cognovit provisions leading, or that could lead, to a confessed judgment in Philadelphia County. The defendants are the county's prothonotary and sheriff, the officials responsible, respectively, for the recording of confessed judgments and for executing upon them. The complaint alleges that each plaintiff has signed one or another type of consumer financing agreement pursuant to which his creditor has entered judgment; that each faces immediate judicial sale of his home or personal belongings; that the Pennsylvania rules and statutes are unconstitutional on their face because they deprive members of the class of procedural due process in the denial of notice and hearing before judgment; that the signing of the cognovit contract was not an intelligent and voluntary waiver of the right to notice and hearing; that the only recourse against the recorded judgment is an action to strike or reopen; and that such recourse is costly and burdensome to low income consumers, and denies them equal protection. The relief sought is a declaration that the Pennsylvania rules and statutes are unconstitutional, and an injunction against the defendants' "operating under the above acts and rules." A three-judge court was requested.

The single District Judge entered a temporary restraining order staying execution of judgments against the seven plaintiffs. He also provided a procedure for add-

ing additional plaintiffs. The three-judge court continued and expanded the restraining order to stay all executions upon confessed judgments in the Commonwealth. A number of additional plaintiffs were added, and one original plaintiff was dismissed from the case. A group of finance companies was permitted to intervene.

Stipulations were made. One was between counsel for the plaintiffs and the city solicitor; another was between counsel for the plaintiffs and for the intervenor finance companies. These stipulations are not identical but they do overlap. They established the following:

1. Judgments by confession against the various plaintiffs had been entered ranging in amounts from $249.23 to $25,800.

2. If called as witnesses, the original plaintiffs would testify to the facts alleged in the complaint. Each would also testify as to his unawareness of the cognovit clause, his lack of understanding of its significance if he had read it, and his inability to bargain about it anyway.

3. If called, some of the plaintiffs would testify that they were encouraged not to read their contracts; that the judgments exceeded the debts because of the addition of penalties, costs, and fees; that they could not afford proceedings to strike or reopen; and that they believed they had meritorious defenses.

4. The imposition and amount of sheriff's costs, bar association fee schedules, and necessary deposition and transcript costs in the cognovit procedure were acknowledged.

The three-judge court held a hearing. In addition to the appearance of counsel for the plaintiffs and for the intervenors, an assistant city solicitor of Philadelphia appeared for the named defendants, and a Deputy Attorney General appeared for the Commonwealth. The only plaintiff to testify was one of those added after the complaint had been filed. She was a postal

clerk who earned $6,100 annually and who had agreed with a door-to-door salesman to buy a carpet for $1,300. Her contract contained a cognovit clause pursuant to which a finance company had obtained a confessed judgment. A detective and a finance company officer were presented by the plaintiffs. They testified to the pervasiveness of cognovit clauses and the "disbelief and shock" of those who had signed them.

The plaintiffs also introduced in evidence by stipulation a published report by David Caplovitz, Ph. D., Consumers in Trouble. This was a 1968 study of confessed-judgment debtors in four major Pennsylvania cities. It included 245 Philadelphia debtors. The study purported to show that 96% had annual incomes of less than $10,000, and 56% less than $6,000; that only 30% had graduated from high school; and that only 14% knew the contracts they signed contained cognovit clauses.

The only other witness at the hearing was one called by the intervenors. He was a finance company officer and testified as to the usual practice of making loans.

The three-judge District Court held:

1. The Pennsylvania system leading to confessed judgment and execution does comply with due process standards provided "there has been an understanding and voluntary consent of the debtor in signing the document." 314 F. Supp., at 1095.

2. If, however, there is no such understanding consent, the procedure violates due process requirements of notice and an opportunity to be heard. *Ibid.*

3. The plaintiffs did not sustain their burden of proof with respect to the lack of valid consent in the execution of bonds and warrants of attorney accompanying mortgages. *Id.*, at 1098.

4. The record did not establish that the action could be maintained as a class action on behalf of individual

natural persons with annual incomes of more than $10,000. *Id.*, at 1098–1099.

5. It could be maintained, however, as a class action on behalf of natural persons residing in Pennsylvania who earn less than $10,000 annually and who signed consumer financing or lease contracts containing cognovit provisions. *Id.*, at 1099.

6. There was no intentional waiver of known rights by members of that class in executing confession-of-judgment clauses. These were the right to have prejudgment notice and hearing, the right to have the burden of proof on the creditor, and the right to avoid the expenses attendant upon opening or striking a confessed judgment. Since the Pennsylvania procedure with respect to the designated class was based upon a waiver concept without adequate understanding, it was violative of due process. *Id.*, at 1100.

7. It was not the federal court's function to dictate to Pennsylvania "exactly what constitutes understanding waiver." *Ibid.* Where the debtor is an attorney, an affidavit to that effect may be all that is necessary to prove understanding, but where the debtor is not a high school graduate more proof "may be required." *Id.*, at 1101. A "statewide rule or legislation providing for the filing of proof of intentional, understanding and voluntary consent," in order to comply with the court's opinion, was among the methods available to the State to permit continued use of the confession-of-judgment clause. *Id.*, at 1100–1101, n. 24.

8. No judgment by confession may be entered as to a member of the recognized class after November 1, 1970, unless it is shown that at the time of executing the document the debtor "intentionally, understandingly, and voluntarily waived" his rights lost under the Pennsylvania law. *Id.*, at 1102–1103.

9. Liens of judgments recorded prior to June 1, 1970 (the date of the filing of the court's opinion), were preserved. A confessed judgment on a contract signed before June 1 could be entered between that date and November 1, but could not be executed upon without a prior hearing to determine the validity of the waiver.

The court then declared the Pennsylvania practice of confessing judgments to be unconstitutional, prospectively effective as of the dates stated, as applied to the class designated, and enjoined the entry of any confessed judgment against a member of the class in the absence of a showing of the required waiver.[3] *Id.*, at 1103. The judge dissenting did so as to the limitation of relief to those earning less than $10,000 annually. *Id.*, at 1102.

III

From this judgment only the plaintiffs appeal. Their claim is that the District Court erred in confining the relief it granted to certain members of the appellants' proffered class and that the court should have declared the Pennsylvania rules and statutes unconstitutional on their face. A holding of facial unconstitutionality, of course, wholly apart from any class consideration, would afford relief to every Pennsylvania cognovit obligor. Today's decision in *Overmyer,* although it concerns a corporate and not an individual debtor, is adverse to this contention of the plaintiff-appellants. In *Overmyer* it is recognized, as the District Court in this case recognized, that, under appropriate circumstances, a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document he signed had contained no cognovit provision.

On the plaintiff-appellants' appeal, therefore, the judgment of the District Court must be affirmed.

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[3] Compare the result reached with respect to the Delaware system in *Osmond* v. *Spence,* 327 F. Supp. 1349 (Del. 1971).

This affirmance, however, does not mean that the District Court's opinion and judgment are approved as to their other aspects and details that are not before us. As has been noted, the named defendants and the intervenors have taken no cross appeal. Furthermore, the Pennsylvania Attorney General's office, apparently due to an interim personnel change, no longer supports the position taken at the trial by the city solicitor and the deputy attorney general and, not choosing to pursue its customarily assumed duty to defend the Commonwealth's legislation, now joins the appellants in urging here that the rules and statutes are facially invalid. With the Attorney General taking this position, argument on the side of the defendant-appellees has been presented to us only by the intervenor finance companies and by *amici*. The permissible reach of this opposition, however, coincides with and goes no further than the extent of the appellants' appeal. In the absence of a cross appeal, the opposition is in no position to attack those portions of the District Court's judgment that are favorable to the plaintiff-appellants.

IV

The decision in *Overmyer* and the disposition of the present appeal prompt the following observations:

1. In our second concluding comment in *Overmyer, supra,* at 188, we state that the decision is "not controlling precedent for other facts of other cases," and we refer to contracts of adhesion, to bargaining power disparity, and to the absence of anything received in return for a cognovit provision. When factors of this kind are present, we indicate, "other legal consequences may ensue." That caveat has possible pertinency for participants in the Pennsylvania system.

2. *Overmyer* necessarily reveals some discomfiture on our part with respect to the present case. However that

may be, the impact and effect of *Overmyer* upon the Pennsylvania system are not to be delineated in the one-sided appeal in this case and we make no attempt to do so.

3. Problems of this kind are peculiarly appropriate grist for the legislative mill.

On the appellants' appeal, the judgment of the District Court is affirmed. The stay heretofore granted by the Circuit Justice is dissolved.

Is is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, concurring.

I join in the opinion of the Court and add these comments about a narrow aspect of the case.

It is true that this Court has no jurisdiction of that portion of the District Court's judgment from which no appeal or cross-appeal was taken. *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191–192 (1937); cf. *United States* v. *Raines*, 362 U. S. 17, 27 n. 7 (1960). But it is also well established that the prevailing party below need not cross-appeal to entitle him to support the judgment in his favor on grounds expressly rejected by the court below. *Walling* v. *General Industries Co.*, 330 U. S. 545 (1947); *Langnes* v. *Green*, 282 U. S. 531, 534–539 (1931); *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435–436 (1924); and the Court may notice a plain error in the record that disposes of a judgment before it. *Reynolds* v. *United States*, 98 U. S. 145, addendum n. to op., pp. 168–169 (1879). Thus, despite the fact that appellee-intervenors did not cross-appeal, they were free to support that part of the judgment in their favor on grounds that were presented and rejected by the District Court

in arriving at an adverse judgment on other aspects of the case. Those grounds, if sustained, would not affect the finality of the unappealed judgment, but they would, if sufficient, be available to support the judgment of the District Court insofar as it is challenged here. Nothing to the contrary is to be inferred from our affirmance of that judgment on other grounds. At least that is my understanding of the Court's opinion, which I join.

MR. JUSTICE DOUGLAS, dissenting in part.

Pennsylvania permits creditors to extract from debtors their consent to a confession-of-judgment procedure which, while not rendering debtors completely defenseless, deprives them of many of the safeguards of ordinary civil procedure. A group of low-income plaintiffs asked the three-judge court below to enjoin the further operation of this scheme on the ground that debtors who consented to this abbreviated form of justice did so unwittingly or did so out of compulsion supplied by the standard form of adhesion contracts. The District Court granted limited relief, holding that the scheme worked a denial of procedural due process only when applied to individual debtors who earned less than $10,000 annually and who entered into nonmortgage credit transactions, except where it is shown prior to judgment that their waivers had been knowing and voluntary. The plaintiffs have appealed, arguing that the lower court should have invalidated the regime on its face and that, in any event, class relief was wrongly denied both to persons earning more than $10,000 yearly and to home mortgagors.

The Commonwealth did not cross-appeal but instead now confesses that the scheme is unconstitutional and agrees substantially with the appellants. Various lending institutions intervened below but have not taken

cross-appeals.[1] When the appeal was filed in this Court, they did, however, file a motion to dismiss that contained an argument on the law governing the main facets of the case. Moreover, at the request of this Court they filed a brief, maintaining that the District Court correctly excluded mortgage borrowers and consumer borrowers with incomes in excess of $10,000 from the class benefited by the decree and that it incorrectly found that the Pennsylvania cognovit procedure was unconstitutional unless the debtor knowingly and understandingly consented to the authorization to confess judgment.

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[1] The absence of a cross-appeal means only that the appellate court will not upset any portion of the lower court's judgment not challenged by the appeal. As stated by Mr. Justice Cardozo in *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191–192:

"Without a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.' *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435. What he may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.' *Ibid.* The rule is inveterate and certain. . . . Findings may be revised at the instance of an appellant, if they are against the weight of evidence, where the case is one in equity. This does not mean that they are subject to like revision in behalf of appellees, at all events in circumstances where a revision of the findings carries with it as an incident a revision of the judgment. There is no need at this time to fix the limits of the rule more sharply. 'Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken.'"

The appellees are the county's prothonotary and sheriff and they are represented here by the Attorney General of Pennsylvania who concedes before us that the State's statutes in question are unconstitutional. No one suggests, however, that there is lacking a case or controversy. Appellants say the District Court did not go far enough. Whether we affirm, modify, or reverse, the decree of the District Court has an ongoing life. It has not become moot. Large interests ride on the outcome of this important litigation.

It is said, however, that the case is not appropriate for review. We refuse to let confessions of error conclusively govern the disposition of cases, acting only after our examination of the record.[2] We have remanded for reconsideration in light of a confession of error. In *Young* v. *United States*, 315 U. S. 257 (1942), however, we declined to remand but instead incorporated into our holding the theory advanced by the Solicitor General in support of the petitioner. Obviously a remand does not bind the courts to the parties' view as to what the law is.

> "The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed." *Id.*, at 258–259.

As we stated in *Sibron* v. *New York*, 392 U. S. 40, 58:

> "It is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained."

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[2] *Mayberry* v. *Pennsylvania*, 382 U. S. 286 (1965); *Nicholson* v. *Boles*, 375 U. S. 25 (1963). See R. Stern & E. Gressman, Supreme Court Practice 224–225 (4th ed. 1969).

That is the practice in civil cases also. *Cates* v. *Haderlein,* 342 U. S. 804.

Moreover, once a case is properly here, our disposition does not necessarily follow the recommendations or concessions of the parties. *Utah Comm'n* v. *El Paso Gas Co.,* 395 U. S. 464, 468–469. In that case, the appellant changed its view of the merits after the case reached us and, like the appellee, thought the appeal should be dismissed. An *amicus,* however, presented contrary views. We concluded that the decree of the District Court, after our prior remand, did not comply with our order. Consensus of the parties does not, in other words, control our decisionmaking process.[3]

The Court, to be sure, approves that part of the District Court's opinion which holds that the Pennsylvania confession-of-judgment scheme cannot constitutionally be applied to the class of Pennsylvania residents who earn less than $10,000 annually and who enter into nonmortgage credit transactions, unless prior to judgment it is shown that they voluntarily and knowingly executed such instruments purporting to waive trial and appeal. On the other hand, the Court now affirms without discussion the refusals of the District Court (1) to extend similar class relief to confessed debtors who either enter into mortgage transactions or who earn more than $10,000 yearly, and (2) to declare the statutes facially unconstitutional. 314 F. Supp. 1091, 1102–1103, 1112 (1970).

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[3] Cf. *California Welfare Rights Organization* v. *Superior Court of Alameda County,* 5 Cal. 3d 730, 488 P. 2d 953 (1971), where a state official against whom an adverse judgment had been obtained took no appeal; but the judgment was challenged in California by an "aggrieved" organization which had been denied intervention in the lower court and which appealed both from the denial of intervention and from the judgment on the merits. The California Supreme Court reversed on the merits.

It is anomalous that an appellee by confessing error can defeat an appeal. In the instant case we have not been handicapped by the appellees' refusal to oppose the judgment below. Finance companies intervened in the District Court. We have been fully informed by them and by *amici* of the many facets of this controversy. We should therefore discuss the merits and reach all issues tendered.

RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WRIGHT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 70–161. Argued January 13, 1972—Decided Febrary 24, 1972*

In light of the adoption of new regulations providing that a recipient of disability benefit payments pursuant to § 225 of the Social Security Act be given notice of a proposed suspension of payments and the reasons therefor, plus an opportunity to submit rebuttal evidence, the judgment is vacated to permit reprocessing, under the new regulations, of the disputed determinations.

321 F. Supp. 383, vacated and remanded.

Assistant Attorney General Gray argued the cause for appellant in No. 70–161 and for appellee in No. 70–5211. With him on the briefs were *Solicitor General Griswold, Kathryn H. Baldwin, Wilmot R. Hastings, Edwin H. Yourman,* and *Paul Merlin.*

Robert N. Sayler argued the cause and filed briefs for appellees in No. 70–161 and for appellants in No. 70–5211.

Briefs of *amici curiae* in both cases were filed by *Thomas L. Fike* for the Legal Aid Society of Alameda County; by *David H. Marlin* and *Jonathan A. Weiss* for the National Council of Senior Citizens; and by *Albert C. Neimeth* for Luella H. Mills et al. *Bernard P. Becker* and *Harvey N. Schmidt* filed a brief for Stella Van Guilder et al. as *amici curiae.*

PER CURIAM.

We noted probable jurisdiction of these appeals, 404 U. S. 819 (1971), to consider the applicability of *Gold-*

*Together with No. 70–5211, *Wright et al.* v. *Richardson, Secretary of Health, Education, and Welfare,* also on appeal from the same court.

berg v. *Kelly*, 397 U. S. 254 (1970), to the suspension and termination of disability benefit payments pursuant to § 225 of the Social Security Act, 70 Stat. 817, 42 U. S. C. § 425, and implementing regulations of the Department of Health, Education, and Welfare. Shortly before oral argument, we were advised that the Secretary had adopted new regulations, effective December 27, 1971, governing the procedures to be followed by the Social Security Administration in determining whether to suspend or terminate disability benefits. These procedures include the requirement that a recipient of benefits be given notice of a proposed suspension and the reasons therefor, plus an opportunity to submit rebuttal evidence. In light of that development, we believe that the appropriate course is to withhold judicial action pending reprocessing, under the new regulations, of the determinations here in dispute. If that process results in a determination of entitlement to disability benefits, there will be no need to consider the constitutional claim that claimants are entitled to an opportunity to make an *oral* presentation. In the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise. Accordingly, we vacate the judgment of the District Court for the District of Columbia, 321 F. Supp. 383 (1971), with direction to that court to remand the cause to the Secretary and to retain jurisdiction for such further proceedings, if any, as may be necessary upon completion of the administrative procedure.

Vacated and remanded.

MR. JUSTICE DOUGLAS, dissenting.

While I join MR. JUSTICE BRENNAN who reaches the merits, I add a word about the unwisdom of the policy pursued by the Court.

A three-judge district court held § 225 of the Social Security Act, 42 U. S. C. § 425, unconstitutional, insofar as it purported to authorize the Secretary of Health, Education, and Welfare to suspend the payment of social security disability benefits without giving prior notice and "an opportunity to participate" to the disability beneficiary. 321 F. Supp. 383, 386. The court remanded the cause to the Secretary for the formulation of new procedures consistent with its opinion. Judge Matthews, troubled by an implication in the majority's opinion that participation merely by way of written submissions might satisfy the majority's notions of due process, dissented "from so much of the opinion as seems to suggest that the procedural requirements of due process may be satisfied with something less than the 'opportunity' [to participate] specified in [*Goldberg* v. *Kelly*, 397 U. S. 254]." *Id.*, at 388. We noted probable jurisdiction in these cross-appeals to evaluate the opinion below in light of *Goldberg*. 404 U. S. 819.

Now, however, it is suggested that the Secretary has so far complied with the instructions of the District Court to formulate new procedures that we should remand the cases to the District Court for further proceedings in light of these new requirements. Such a course, I submit, would be a perversion of the philosophy of due process that we expressed in *Goldberg*.

Judge Matthews, below, captured the essence of *Goldberg* in her brief partial dissent:

> "In *Goldberg* the Supreme Court held that a welfare recipient, in addition to timely and adequate notice detailing the reasons for a proposed termination of benefits, must have 'an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.'" 321 F. Supp., at 387–388.

It cannot seriously be argued that the Secretary's "new rules" comport with *Goldberg*. They may cure the notice defect, but they make no provision whatsoever for the presentation of oral testimony or the confrontation of witnesses.[1] We noted probable jurisdiction, I thought, to determine if the difference between "welfare" payments and "disability" payments is sufficient to say that one's Fifth Amendment right to be heard may be satisfied by an opportunity to make written submissions in the latter case, although not in the former.[2] We heard oral argument on this basis. Because of the inadequacy of the new rules, in light of *Goldberg*, the question will remain regardless of the outcome of a remand.

I think it unseemly, needlessly to shuttle any litigant, especially an indigent, back and forth from court to court, hoping that his exhaustion of newly created remedies will somehow or other make his problem disappear and relieve us of an obligation. No concession promising justice to the claimants has been made. The issue of due process

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[1] The new provisions were issued as amendments to the Disability Insurance State Manual (DISM). DISM § 265.1D now requires state agencies to inform a beneficiary of a proposed suspension of benefits, and the reasons therefor, before it formally requests the Bureau of Disability Insurance to authorize the suspension. The beneficiary must also be given an opportunity to submit rebuttal evidence. *Ibid.* But the "opportunity" contemplated by this section, and the similar provisions respecting cessation of benefits (DISM § 353.6A), encompass only written submissions.

[2] This cause, however, like *Goldberg*, "presents no question requiring our determination whether due process requires only an opportunity for written submission, or an opportunity both for written submission and oral argument, where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues." 397 U. S., at 268 n. 15. Disability cases, like welfare cases, invariably turn on difficult and complex resolutions of hotly disputed factual questions. See, *e. g.*, *Underwood* v. *Ribicoff*, 298 F. 2d 850, 851 (CA4 1962).

was properly raised and is here for decision; and all the requirements of case or controversy within the meaning of Art. III of the Constitution have been satisfied.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

I respectfully dissent. The Court justifies today's *sua sponte* action on the ground that if reprocessing under the Secretary's new regulations "results in a determination of entitlement to disability benefits, there will be no need to consider the constitutional claim that claimants are entitled to an opportunity to make an *oral* presentation." (Emphasis by the Court.) Avoidance of unnecessary constitutional decisions is certainly a preferred practice when appropriate. But that course is inappropriate, indeed irresponsible, in this instance. We will not avoid the necessity of deciding the important constitutional question presented by claimants even should they prevail upon the Secretary's reconsideration. The question is being pressed all over the country. The Secretary's brief lists no less than seven cases presenting it with respect to disability benefits and 10 cases presenting it with respect to nondisability benefits.[1]

[1] "The issue regarding a right to a hearing prior to suspension or termination of disability benefits is presented in a number of other cases: *Doyle* v. *Richardson* (C.A. 5, No. 31,104); *Moore* v. *Richardson* (N.D. Calif., Civ. No. C–70–2573); *Eldridge* v. *Richardson* (W.D. Va., Civ. No. 70–C–52–A) (dismissed May 6, 1971); *Dye* v. *Richardson* (W.D. Pa., Civ. No. 70–1384) (dismissed March 8, 1971); *Harvey* v. *Richardson* (W.D. Pa., Civ. No. 70–1460); *Rodriquez* v. *Finch* (D. Colo., Civ. No. C–2294) (dismissed July 1, 1971); *Olivas* v. *Secretary of HEW* (D. Colo., Civ. No. C–3262). The issue is also presented in several nondisability cases: *Anderson* v. *Finch* (N.D. Ohio, Civ. No. 70–425, decided January 15, 1971, and pending before C.A. 6, No. 71–1317); *Garofalo* v. *Richardson* (S.D.N.Y., Civ. No. 70–5133) (remanded July 16, 1971); *Lindsay* v. *Richardson*

The Secretary's new regulations permit discontinuance of disability benefits without affording beneficiaries procedural due process either in the form mandated by *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), or in the form mandated by the District Court, 321 F. Supp. 383 (DC 1971). The regulations require only that the beneficiary be informed of the proposed suspension or termination and the information upon which it is based and be given an opportunity to submit a written response before benefits are cut off.[2] This procedure does not afford the beneficiary, as *Goldberg* requires for welfare and old-age recipients, an evidentiary hearing at which he may personally appear to offer oral evidence and confront and cross-examine adverse witnesses. Nor does the procedure satisfy the requirements of due process as determined by the District Court. That court held that the beneficiary must be given not only notice but also, before he responds, a "reasonable opportunity to examine the documentary evidence" upon which the Secretary relies and, in case of conflict in the evidence, a decision by an impartial decisionmaker. The court said, however, that an evidentiary hearing and opportunity to confront adverse witnesses

(W.D. N.C., Civ. No. 2794); *Van Guilder* v. *Richardson* (D. Minn., Civ. No. 4–70–386); *Hopkins* v. *Richardson* (E.D. Pa., Civ. No. 71–37); *Shisslak* v. *H. E. W.* (D. Ariz., Civ. No. 71–35 TUC, decided April 9, 1971 and pending before C.A. 9, No. 71–2060); *Baker* v. *Finch* (N.D. Ga., Civ. No. 13786, decided September 13, 1971); *Corona* v. *Richardson* (N.D. Calif., Civ. No. 70–2662); *Recide* v. *Richardson* (D. Hawaii, Civ. No. 70–3426); *Mills* v. *Richardson* (N.D.N.Y., Civ. No. 71–CV–208, decided October 15, 1971)." Brief for the Secretary 8–9, n. 9.

[2] Apparently the new procedures apply only to cases involving issues of medical recovery. We are advised, however, that "[t]he Secretary is presently developing a similar termination procedure to cover terminations in cases involving a return to work but no issue of medical recovery." Supplemental Brief for the Secretary 3.

were not necessary, although "a hearing could be held" if the beneficiary "submitted some evidence that contradicts that possessed by the Administration." 321 F. Supp., at 387. Thus, under both *Goldberg* and the District Court's decision, the omissions in the Secretary's new regulations are fatal to the constitutional adequacy of the procedures. Because we may imminently be confronted with another case presenting the question, and because its resolution is vitally essential to the administration of an important Government program, today's action in avoiding decision of the constitutional question is not a responsible exercise of that practice. We gain a brief respite for ourselves while the Secretary, state agencies, and beneficiaries continue confused and uncertain. Moreover, the question has been thoroughly and ably argued and briefed on both sides, and we have the benefit of thoughtful and well-considered majority and dissenting opinions in the District Court. Today's disposition results in an unjustified waste, not only of our own all too sparse time and energies, but also of the time and energies of the three judges of the District Court who must again suspend their own heavy calendars to assemble for what can only be an empty exercise. I cannot join in the Court's abdication of our responsibility to decide this case.

Both the beneficiaries and the Secretary appeal from the District Court's judgment. The beneficiaries contend that the District Court erred in not holding that the procedure must afford an evidentiary hearing as in *Goldberg*. The Secretary contends that procedural due process requirements are satisfied by the "paper" hearing afforded by his new regulations. I agree with the beneficiaries and would therefore vacate the judgment of the District Court and remand with direction to enter a new judgment requiring the procedures held in *Goldberg* to be requisite with respect to discontinuance of welfare

and old-age benefits. See *Wheeler* v. *Montgomery*, 397 U. S. 280 (1970).

Section 225 of the Social Security Act, 42 U. S. C. § 425, provides that "[i]f the Secretary, on the basis of information obtained by or submitted to him, believes that an individual entitled to benefits . . . may have ceased to be under a disability, the Secretary may suspend the payment of benefits . . . until it is determined . . . whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased." The District Court held the statute unconstitutional on the ground that "[t]he ex-parte suspension power granted to the Secretary by section 225 is summary adjudication that is inconsistent with the requirements of due process." 321 F. Supp., at 386.

The Secretary does not challenge that holding in this Court as applied to his now-discarded procedures. Rather, the Secretary insists that the "hearing on paper" afforded to disability beneficiaries by his new regulations is constitutionally sufficient. The Secretary does not contend that disability beneficiaries differ from welfare and old-age recipients with respect to their entitlement to benefits or the drastic consequences that may befall them if their benefits are erroneously discontinued. The only distinctions urged are that the evidence ordinarily adduced to support suspension and termination of disability benefits differs markedly from that relied upon to cut off welfare benefits and that an undue monetary and administrative burden would result if prior hearings were required. Neither distinction withstands analysis.

First. The Secretary points out that the decision to discontinue disability benefits is generally made upon the basis of wage reports from employers and reports of medical examinations. This evidence, in the Secretary's view, "is highly reliable and not of a type that draws into issue veracity or credibility." Brief 10.

"The basis upon which disability benefits are suspended or terminated thus differs significantly from that upon which the terminations of welfare benefits involved in [*Goldberg*] rested." *Id.*, at 25. Hence, the Secretary concludes, while procedural due process requires a pre-termination evidentiary hearing for welfare and old-age recipients, for disability beneficiaries a written presentation will suffice.

The Secretary seriously misconstrues the holding in *Goldberg*. The Court there said that "the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits." 397 U. S., at 267. The Secretary does not deny that due process safeguards fulfill the same function in disability cases. In *Goldberg*, the Court held that welfare recipients were entitled to hearings because decisions to discontinue benefits were challenged "as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Id.*, at 268. The Court expressly put aside consideration of situations "where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues." *Id.*, at 268 n. 15. However reliable the evidence upon which a disability determination is normally based, and however rarely it involves questions of credibility and veracity, it is plain that, as with welfare and old-age determinations, the determination that an individual is or is not "disabled" will frequently depend upon the resolution of factual issues and the application of legal rules to the facts found. It is precisely for that reason that a hearing must be held.

The Secretary, of course, recognizes that disability determinations often involve factual disputes. His new

procedures, as well as the post-termination procedures already available, presumably derive from that premise. The beneficiary may file a written response presenting rebuttal evidence before his benefits are suspended or terminated; after termination, he is entitled to reconsideration, based upon written submissions, and then a *de novo* evidentiary hearing, administrative appellate review of the hearing examiner's decision, and, finally, judicial review. Nevertheless, the Secretary insists that the decision to discontinue disability benefits differs from the decision to discontinue welfare benefits because the latter "may" be based upon "personal and social situations brought to the attention of the authorities by tips, rumor or gossip." Brief 25. Yet it is irrelevant how the matter is "brought to the attention of the authorities," whether "by tips, rumor or gossip" or otherwise. The question in a welfare determination, as in a disability determination, is simply whether the recipient continues to be eligible for benefits. Nor does the Secretary make clear the relevance of "personal and social situations." The Secretary does say that "[o]ne of the recipients in [*Goldberg*], for example, had been cut off because of her alleged failure to cooperate with welfare authorities in suing her estranged husband; payments to another were terminated because of alleged drug addiction." *Ibid.* The second recipient, however, was cut off because "he refused to accept counseling and rehabilitation." 397 U. S., at 256 n. 2. Consequently, both recipients lost their benefits for refusing to cooperate with the authorities. That, however, is no distinction from disability cases, for disability benefits will also be discontinued if the beneficiary refuses to cooperate.

To support the assertion that pre-termination hearings are required in welfare cases because "credibility and veracity" are in issue, the Secretary focuses upon

certain language in *Goldberg*. He first quotes the statement that "[p]articularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Id.*, at 269. Apart from the obvious fact that that was not an absolute statement intended to limit hearings solely to those instances, it was but one of three reasons given to demonstrate that written submissions are insufficient. The Court also said that written submissions "are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance" and that they "do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important." *Ibid.* Significantly, the Secretary does not deny that those reasons are as fully applicable to disability beneficiaries as to welfare recipients.

The Secretary also relies upon the statement, quoted in *Goldberg* from *Greene* v. *McElroy*, 360 U. S. 474, 496 (1959), that:

> "[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on *fact findings*, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is *important* in the case of documentary evidence, it is even *more important* where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination." 397 U. S., at 270 (emphasis added).

Again, however, the statement hardly indicates that confrontation and cross-examination are available to welfare recipients only because "credibility and veracity" are in issue. An individual has those rights because *facts* are in issue, as the statement makes clear. Moreover, the Court introduced its quotation of that statement in *Goldberg* by pointing out that "[i]n almost every setting where important decisions turn on *questions of fact*, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.*, at 269 (emphasis added). And, even assuming the validity of the novel doctrine that confrontation and cross-examination are available solely for the purpose of testing "credibility and veracity," that would not justify depriving the disability beneficiary of "an effective opportunity to defend . . . by presenting his own arguments and evidence orally." *Id.*, at 268. Finally, I see no reason to suppose, nor does the Secretary suggest any, that the "credibility and veracity" of doctors and employers can never be in issue in a disability case. Indeed, the Secretary's new regulations indicate that they may. See Disability Ins. State Manual § 353.

The premise of the Secretary's entire argument is that disability benefits are discontinued "only on the basis of an objective consideration—that the previous disability has ceased—and that conclusion rests on reliable information." Brief 26. Whether or not the information is reliable, the premise is questionable. The Secretary himself emphasizes that disability determinations require "specialized medical and vocational evaluations" and not simply the acquisition of "medical and other relevant data." *Id.*, at 28. In any event, there are three grounds, pertinent here, upon which disability can be found to have ceased. None can fairly be characterized by the term "objective."

First, cessation of disability may be found if the beneficiary refuses to cooperate with the social security authorities. 20 CFR § 404.1539 (c); see Claims Manual § 6706 (e). That judgment, of course, could be wholly subjective, as the Secretary points out with reference to welfare cases.

Second, cessation may be found if the beneficiary "has regained his ability to engage in substantial gainful activity . . . as demonstrated by work activity." 20 CFR § 404.1539 (a)(2); see Claims Manual § 6706 (a). That decision does not, as the Secretary appears to assert, rest solely "upon regular reports made by [the beneficiary's] employers to the government." Brief 25. Rather, "the work performed" by the beneficiary "may demonstrate" that he is no longer disabled, but only if it "is both substantial and gainful." "Substantial work activity involves the performance of significant physical or mental duties, or a combination of both, productive in nature." A finding of "substantial gainful activity" depends upon the nature of the work performed, the adequacy of the performance, and the special conditions, if any, of the employment, as well as an evaluation of the time spent and the amount of money earned by the beneficiary. 20 CFR §§ 404.1532–404.1534.

Third, cessation of disability may be found if the evidence establishes medical recovery. 20 CFR § 404.1539 (a)(1); see Claims Manual § 6706 (c). That decision, of course, will be based upon medical examinations, but it does not follow that it is necessarily "objective." "The function of deciding whether or not an individual is under a disability is the responsibility of the Secretary," and a medical conclusion that the beneficiary is or is not disabled "shall not be determinative of the question." 20 CFR § 404.1526. The Secretary's decision that a beneficiary's impairment "is no longer of such severity as to prevent him from engaging

in any substantial gainful activity," 20 CFR § 404.1539 (a)(1), obviously depends upon more than an "objective" medical report, for the application of the legal standard necessarily requires the exercise of judgment. And, of course, multiple conflicting medical reports are "not uncommon." *Richardson* v. *Perales,* 402 U. S. 389, 399 (1971).

The Secretary's claim for "objectivity" is even less persuasive in the situation where a beneficiary's benefits are suspended. "Benefits are suspended when information is received which indicates that the individual may no longer be under a disability." Claims Manual § 6708. Here, by definition, there has been no determination that disability has ceased.

Finally, the post-termination reversal rate for disability determinations makes the asserted "objectivity" even more doubtful. According to the Secretary's figures for 1971, 37% of the requests for reconsideration resulted in reversal of the determination that disability had ceased. Moreover, 55% of the beneficiaries who exercised their right to a hearing won reversal. While, as the Secretary says, these figures may attest to the fairness of the system, *Richardson* v. *Perales, supra,* at 410, they also appear to confirm that the Court's reference in *Goldberg* to "the welfare bureaucracy's difficulties in reaching correct decisions on eligibility," 397 U. S., at 264 n. 12, is fully applicable to the administration of the disability program.

Second. The Secretary also contends that affording disability beneficiaries the opportunity to participate in evidentiary hearings before discontinuance of their benefits will result in great expense and a vast disruption of the administrative system. This justification for denial of pre-termination hearings was, of course, specifically rejected in *Goldberg,* 397 U. S., at 265–266, and

the Secretary offers no new considerations to support its acceptance here.

In *Goldberg*, the Court pointed out "that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." 397 U. S., at 264 (emphasis in original). That statement applies equally to eligible disability beneficiaries, for, as the District Court noted and the Secretary does not deny, "a disability beneficiary is by definition unable to engage in substantial gainful activity and he would, therefore, be liable to sustain grievous loss while awaiting the resolution of his claim." 321 F. Supp., at 386. In view of that result, the District Court concluded that the "fiscal and administrative expenses to the government, whatever their magnitude, are insufficient justification considering the crippling blow that could be dealt to an individual in these circumstances." *Ibid.* The Secretary's response is simply to stress the magnitude of the burden.

Here, as in *Goldberg*, "[t]he requirement of a prior hearing doubtless involves some greater expense." 397 U. S., at 266. The Secretary points out that current procedures include a two-step determination of disability: first by the state agency, after a district office of the Social Security Administration has conducted a disability investigation, and then, on review of the state agency's determination, by the Administration's Bureau of Disability Insurance, which is located in Baltimore, Maryland.[3] Thus, the Secretary says, a prior hearing "either would require the beneficiary to travel great distances or would necessitate that State or federal officials travel to the area in which the beneficiary resides,

[3] The Bureau cannot reverse a state agency's finding that disability has ceased, although it can require reconsideration by the agency. 42 U. S. C. § 421 (c); 20 CFR § 404.1520 (c); Claims Manual § 6701 (c); see Brief for the Secretary 11–12, 17.

neither of which is practical." Brief 28–29. "Nor could the decision-making function be turned over to the Administration's district offices, which are located conveniently to the beneficiaries, without staffing them with individuals qualified to make the necessary medical and vocational judgment." *Id.*, at 29. Hence, the Secretary concludes, prior hearings "would require massive restructuring of the existing administrative adjudicative process." *Id.*, at 27.

Except for bald assertion, the Secretary offers nothing to indicate that any great burden upon the system would result if the state agencies conducted the hearings. Moreover, the Secretary omits even to mention the existence of the current post-termination hearing procedures. See 20 CFR §§ 404.917–404.941. It is reasonable to assume that the only "restructuring" necessary would be a change in the timing of the hearings. That was apparently the method by which the Secretary required the States to comply with *Goldberg* in the administration of various other social security programs, see 45 CFR § 205.10, 36 Fed. Reg. 3034–3035, and it would seem to be an equally available response here. While the administration of the disability program to provide prior hearings may involve "some greater expense," as the Court noted in *Goldberg*, 397 U. S., at 266, that expense should not be exaggerated in order to deprive disability beneficiaries of their right to "rudimentary due process," *id.*, at 267.

The Secretary also claims that the requirement of prior hearings "would result in losses to the Social Security Trust Fund of nearly $16 million per year for disability cases and still greater sums when all Title II programs are considered." Brief 10. This conclusion does not follow from the facts the Secretary presents.

As to the disability program, the Secretary says that in 1971 there were 38,000 determinations that disability

had ceased and that the average monthly benefit in those cases was $207. If, to provide prior hearings, terminations were delayed for two months, the Secretary says, the cost in benefits paid pending the hearings would approach $16 million. It is immediately apparent that this figure is grossly inflated.

First, this figure depends upon the unwarranted assumption that all beneficiaries will demand a prior hearing. The Secretary suggests no reason to suppose that would happen. In fact, while there were 38,000 disability cessations in 1971, there were only 10,941 requests for reconsideration, and although 6,885 cessations were affirmed on reconsideration, there were only 2,330 requests for hearings. These post-termination procedures, of course, were utilized by beneficiaries who could not present their views before termination. Under the new regulations, affording notice and the opportunity to respond in writing before termination, it may well be that even fewer beneficiaries will demand hearings. In any event, experience in the welfare area has not demonstrated that recipients abuse their right to pre-termination hearings, and the Secretary does not claim that disability beneficiaries will do so.

Second, the $16 million figure requires not only that all 38,000 beneficiaries request prior hearings, but also that they all lose. Yet, as noted above, 37% of the reconsiderations on written submissions and 55% of the post-termination hearings in 1971 resulted in reversal. The Secretary does not claim, nor is it conceivable, that in every case a prior hearing would uphold the initial determination that disability had ceased.

Third, not only must every beneficiary request a prior hearing and every hearing affirm cessation of disability, it must also be true, to reach the $16 million figure, that the Secretary will be unable to recover any of the benefits paid to beneficiaries pending the hearings. That result

is unlikely. Section 204 (a)(1) of the Act, 42 U. S. C. § 404 (a)(1); see 20 CFR §§ 404.501–404.502, directs the Secretary, if he finds that there has been an overpayment, to require a refund from the beneficiary or to decrease any future benefits to which he may be entitled. Thus, if the beneficiary is not "disabled," he presumably can engage in "substantial gainful activity," and the Secretary may well secure a refund. If, on the other hand, the case is a close one and the beneficiary is later found to be "disabled" again, the Secretary may reduce his benefits. Furthermore, § 204 (b), 42 U. S. C. § 404 (b); see 20 CFR §§ 404.506–404.509, directs the Secretary not to require a refund or decrease benefits if the beneficiary "is without fault" and a refund or decrease "would defeat the purpose of" the Act or "would be against equity and good conscience." The Secretary's duty to waive claims for excess payments may well apply in many termination cases, particularly where the beneficiary is judgment proof. See 20 CFR § 404.508. Obviously, there is no loss to the social security fund if benefits paid to an ineligible beneficiary pending a hearing are subject to statutory waiver.

Fourth, the $16 million figure depends upon the stated premise that the requirement of a hearing would cause a two-month delay in the termination of benefits. The Secretary does not explain why he chose that time period. Under the new regulations, a beneficiary receives notice of the proposed discontinuance, is informed of the information upon which it is based, and is given the opportunity to submit a written response presenting rebuttal evidence. Only then is the disability determination made. It is difficult to believe that it would require another two months just to provide a hearing.

Finally, under § 223 (a)(1) of the Act, 42 U. S. C. § 423 (a)(1); see Claims Manual § 6707, benefits must be paid for two months after the month in which disa-

bility ceases. The $16 million figure depends upon the unwarranted assumption that all terminations occur at least two months after disability is found to have ceased. In this case, for example, the state agency determined that plaintiff Atkins' disability ceased in January. The Bureau of Disability Insurance approved that determination and on February 3 informed Atkins that his benefits would be terminated at the end of March. Thus, even assuming a two-month delay for a hearing, there would be no cost whatever to the trust fund.

Viewing Title II programs as a whole, the Secretary points out that there were nearly three million terminations of benefits in 1969. The vast majority of these terminations were for death, attainment of a certain age, and so forth, but the Secretary asserts that apart from those cases there were 515,189 terminations that would have been affected by the requirement of a prior hearing. That number, however, includes terminations based upon a student's leaving school, a change in a beneficiary's marital status, and the death or adoption of a child. Without those cases, the number drops to 186,035. Moreover, even this number includes disability terminations and the terminations of dependents based thereon. Putting aside those cases, the total appears to be somewhat closer to 100,000. While that is a substantial number of terminations, the Secretary does not indicate what issues are involved in making the decisions. As noted above, prior evidentiary hearings are necessary in disability cases because factual disputes exist. They may exist to a far lesser extent in other programs. Moreover, to whatever extent they do exist, the objections to the Secretary's inflated cost figure for disability terminations would seem to apply equally to nondisability terminations. In any event, the Secretary has simply provided the bare number of terminations, with no further information, and it

is inappropriate, if not impossible, to decide what effect requiring prior hearings in disability cases will have on nondisability cases.

I do not deny that prior hearings will entail some additional administrative burdens and expense. Administrative fairness usually does. But the Secretary "is not without weapons to minimize these increased costs." *Goldberg* v. *Kelly*, 397 U. S., at 266. Despite the Secretary's protestations to the contrary, I believe that in the disability, as in the welfare, area "[m]uch of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pretermination hearings and by skillful use of personnel and facilities." *Ibid.* The Court's conclusion on this point in *Goldberg* is fully applicable here:

> "Indeed, the very provision for a post-termination evidentiary hearing . . . is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." *Ibid.*

My answers to the Secretary's contentions are also the reasons I disagree with the majority of the District Court and agree with the dissenting judge. I would therefore vacate the judgment of the District Court and remand with direction to enter a new judgment requiring that disability benefits not be discontinued until the beneficiary has been afforded procedural due process in the form mandated by *Goldberg* with respect to discontinuance of welfare and old-age benefits.

IOWA BEEF PACKERS, INC. *v.* THOMPSON ET AL.

CERTIORARI TO THE SUPREME COURT OF IOWA

No. 70–286. Argued January 12, 1972—Decided February 29, 1972

Court's grant of certiorari to decide whether employees may sue for overtime allegedly withheld in violation of the Fair Labor Standards Act if the complaint of that violation was also subject to grievance and arbitration provisions of a collective-bargaining agreement *held* improvidently granted in view of subsequent disclosure that those provisions did not apply to all disputes, but merely those based on violations of the agreement.

185 N. W. 2d 738, certiorari dismissed as improvidently granted.

Louis S. Goldberg argued the cause for petitioner. With him on the brief was *P. L. Nymann.*

Raymond Edward Franck argued the cause and filed a brief for respondents.

A. Raymond Randolph, Jr., argued the cause *pro hac vice* for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Griswold* and *Richard F. Schubert.*

PER CURIAM.

Respondents brought this suit in an Iowa District Court under § 16 (b) of the Fair Labor Standards Act, 52 Stat. 1069, as amended, 29 U. S. C. § 216 (b), to recover overtime compensation allegedly not paid by their petitioner employer in violation of the overtime provisions of the Act, 29 U. S. C. § 207 (a)(1). The District Court denied petitioner's motion to dismiss the action for failure of respondents to exhaust the grievance arbitration procedures provided in a collective-bargaining agreement between petitioner and respondents' union and awarded respondents the overtime claimed plus costs and attorneys' fees. The Supreme Court of Iowa affirmed, 185

N. W. 2d 738 (1971). We granted certiorari, 404 U. S. 820 (1971).

The collective-bargaining agreement required petitioner to provide a lunch period for each employee no later than five hours from the start of an employee's shift. Petitioner provided the lunch period but required the employees to remain on call during the period. Respondents did not choose, as perhaps under the contract was open to them, to make the requirement the basis of a grievance for alleged violation either of the lunch-period provision or of the hours-of-work provision, Art. VII, requiring time and one-half for hours worked over eight in any day or 40 in any week. They claimed instead that, because of the requirement, the Fair Labor Standards Act, as a matter of law, rendered the lunch period "work" time, whether or not actually worked, for the purpose of determining whether petitioner violated its statutory obligation to pay overtime rates for work hours over 40 in any work week. See *Armour & Co.* v. *Wantock,* 323 U. S. 126 (1944). The grievance thus pertained not to an alleged violation of the agreement but to an alleged violation of the Fair Labor Standards Act.

In *U. S. Bulk Carriers* v. *Arguelles,* 400 U. S. 351 (1971), the Court held that a seaman could sue in federal court for wages under 46 U. S. C. § 596 without invoking grievance and arbitration procedures under a collective-bargaining agreement that provided for resolution of all disputes and grievances, not merely those based on alleged violations of the contract. We granted certiorari in this case to decide whether, similarly, employees may sue in court to recover overtime allegedly withheld in violation of the Fair Labor Standards Act, if their complaint of alleged statutory violation is also subject to resolution under grievance and arbitration provisions of a collective-bargaining agreement. It developed at oral argument, however, that the grievance and arbitration

provisions, Art. XX of the collective-bargaining agreement involved in this case, do not have the broad scope of the procedures in *Arguelles*, but apply only to grievances "pertaining to a violation of the Agreement." Moreover, the issues as presented by petitioner provide no occasion to address, and we intimate no view upon, the question whether, although the statutory claim is not subject to contract arbitration, pursuit of the statutory remedy is nevertheless barred because respondents might have made the requirement to be on call the basis of a grievance for alleged violation of the lunch period or overtime provision of the collective-bargaining agreement. In these circumstances, which were not fully apprehended at the time certiorari was granted, the writ of certiorari will be dismissed as improvidently granted. *The Monrosa* v. *Carbon Black, Inc.*, 359 U. S. 180, 183 (1959).

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

The arbitration clause in this collective agreement reaches "a grievance pertaining to a violation of the Agreement." The agreement covered both the lunch period [1] and overtime.[2]

The Iowa Supreme Court held that "[t]he present controversy is undoubtedly arbitrable" under the collective agreement. Given the presumption favoring liberal construction of arbitration clauses, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 582–583, we should defer to

[1] Article XIV, § 1, states:

"A lunch period shall be provided no later than five (5) hours from the start of an employee's shift, except when the shift does not exceed five and one-half (5½) hours."

[2] Article VII, § 3, states:

"Time and one-half (1½) will be paid for hours worked in excess of eight (8) in any day. Time and one-half (1½) will be paid for all hours worked in excess of forty (40) in any one week."

that ruling. Even under that construction, it seems that a suit for overtime allegedly withheld in violation of the Fair Labor Standards Act, 29 U. S. C. § 207 (a)(1) is maintainable. That would mean affirming the Iowa Supreme Court. *U. S. Bulk Carriers* v. *Arguelles,* 400 U. S. 351, which kept the courthouse door open, would seem to control this case.[3]

An affirmance would follow, *a fortiori,* if this collective agreement be construed as not requiring arbitration of this FLSA claim. For then it would seem that the worker would have a choice to sue under the statute or to proceed to arbitration on his contractual claim arising out of the same dispute.

The petition, however, is not dismissed for those reasons but for a wholly different one. It is said that there was a requirement to be "on call" and that that duty conflicted with the lunch or overtime provisions of the agreement. The difficulty is twofold: there was no "on call" grievance ever tendered so far as the record

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[3] The Iowa Supreme Court properly stated:

"We doubt that the general Congressional intent favoring arbitration can stand against the specific Congressional intent which is manifest in the Fair Labor Standards Act provisions giving employees strong and detailed rights in court. We think Congress intended that workmen should have free access to the courts in FLSA cases. We are the more persuaded of that view by the broad Congressional policy expressed in § 2 of FLSA, 29 U. S. C. A. § 202. There the objectives of the act are set forth, and those objectives encompass more than simply wage relief for employees; they include broad economic considerations—improvement in commerce among the states. The remedies provided by the act are part of the Congressional scheme to obtain employer compliance with the act and hence achievement of those broader objectives. We believe that if Congressional intent to allow a seaman to arbitrate or sue at his option is manifest in the seaman's act involved in Arguelles, as the Court held there, then an intent to give workmen such an option is also manifest in the Fair Labor Standards Act." 185 N. W. 2d 738, 742.

shows; moreover, the agreement concededly does not cover any "on call" requirement or duty. So there is no conflict between statutory remedy and remedy by arbitration and the difficulty posed is imaginary.

We should "dismiss as improvidently granted" only in exceptional situations and where all nine members of the Court agree. In all other cases the merits of the controversy should be decided. The present case on its facts is simple and uncomplicated; and a decision on the merits is apparently important to unions and employer alike.

Syllabus

FEDERAL TRADE COMMISSION v. SPERRY & HUTCHINSON CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70–70. Argued November 15, 1971—Decided March 1, 1972

The Federal Trade Commission (FTC) entered a cease-and-desist order against Sperry & Hutchinson Co. (S&H), the largest and oldest trading stamp company, on the ground that it unfairly attempted to suppress the operation of trading stamp exchanges and other "free and open" redemption of stamps. S&H argued in the Court of Appeals that its conduct was beyond the reach of § 5 of the Federal Trade Commission Act, which it claimed permitted the FTC to restrain only such practices as are either in violation of the antitrust laws, deceptive, or repugnant to public morals. The Court of Appeals reversed the FTC, holding that the FTC had not demonstrated that S&H's conduct violated § 5 because it had not shown that the conduct contravened either the letter or the spirit of the antitrust laws. *Held:*

1. The Court of Appeals erred in its construction of § 5. Congress, as previously recognized by this Court, see *FTC* v. *R. F. Keppel & Bro.*, 291 U. S. 304, defines the powers of the FTC to protect consumers as well as competitors and authorizes it to determine whether challenged practices, though posing no threat to competition within the letter or spirit of the antitrust laws, are nevertheless either unfair methods of competition, or unfair or deceptive acts or practices. The Wheeler-Lea Act of 1938 reaffirms this broad congressional mandate. Pp. 239–244.

2. Nonetheless the FTC's order cannot be sustained. The FTC does not challenge the Court of Appeals' holding that S&H's conduct violates neither the letter nor the spirit of the antitrust laws and its opinion is barren of any attempt to rest its order on the unfairness of particular competitive practices or on considerations of consumer interests. Nor did the FTC articulate any standards by which such alternative assessments might be made. Pp. 245–249.

3. The judgment of the Court of Appeals setting aside the FTC's order is affirmed, but because that court erred in its construction of § 5, its judgment is modified to the extent that the case is remanded with instructions to return it to the FTC for

further proceedings not inconsistent with this opinion. Pp. 249–250.

432 F. 2d 146, modified and remanded.

WHITE, J., delivered the opinion of the Court, in which all Members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

Assistant Attorney General McLaren argued the cause for petitioner. With him on the briefs were *Solicitor General Griswold, Harold D. Rhynedance, Jr., Karl H. Buschmann,* and *Richard H. Stern.*

Harold L. Russell argued the cause for respondent. With him on the brief were *Samuel K. Abrams, Claus Motulsky, J. Sam Winters, Alan R. Wentzel,* and *Wayne T. Elliott.*

MR. JUSTICE WHITE delivered the opinion of the Court.

In June 1968 the Federal Trade Commission held that the largest and oldest company in the trading stamp industry,[1] Sperry & Hutchinson (S&H), was violating § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45 (a)(1), in three respects. The Commission found that S&H improperly regulated the maximum rate at which trading stamps were dispensed by its retail licensees; that it combined with others to regulate the rate of stamp dispensation throughout the industry; and that it attempted (almost invariably successfully) to suppress the operation of trading stamp exchanges and other "free and open" redemption of stamps. The Commission entered cease-and-desist orders accordingly.

[1] On the nature of the industry, see generally Comment, Trading Stamps, 37 N. Y. U. L. Rev. 1090 (1962). The Commission proceedings in the instant case are discussed in Comment, The Attack on Trading Stamps—An Expanded Use of Section 5 of the Federal Trade Commission Act, 57 Geo. L. J. 1082 (1969).

S&H appealed only the third of these orders. Before the Court of Appeals for the Fifth Circuit it conceded that it acted as the Commission found, but argued that its conduct is beyond the reach of § 5 of the Act. That section provides, in pertinent part, that:

> "The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 15 U. S. C. § 45 (a)(6).

As S&H sees it, § 5 empowers the Commission to restrain only such practices as are either in violation of the antitrust laws, deceptive, or repugnant to public morals. In S&H's view, its practice of successfully prosecuting stamp exchanges in state and federal courts cannot be restrained under any of these theories.

The Court of Appeals for the Fifth Circuit agreed and reversed the Commission, Judge Wisdom dissenting. 432 F. 2d 146 (1970). In the lower court's view:

> "To be the type of practice that the Commission has the power to declare 'unfair' the act complained of must fall within one of the following types of violations: (1) a per se violation of antitrust policy; (2) a violation of the letter of either the Sherman, Clayton, or Robinson-Patman Acts; or (3) a violation of the spirit of these Acts as recognized by the Supreme Court of the United States." *Id.*, at 150 (footnote omitted).

Holding that the FTC had not demonstrated that S&H's conduct violated either the letter or the spirit of the antitrust laws, the Court of Appeals vacated the Commission's order.

The FTC petitioned for review in this Court. We granted certiorari to determine the questions presented in the petition. 401 U. S. 992 (1971).

I

The Challenged Conduct

S&H has been issuing trading stamps—small pieces of gummed paper about the size of postage stamps—since 1896. In 1964, the year from which data in this litigation are derived, the company had about 40% of the business in an industry that annually issued 400 billion stamps to more than 200,000 retail establishments for distribution in connection with retail sales of some 40 billion dollars. In 1964, more than 60% of all American consumers saved S&H Green Stamps.

In the normal course, the trading stamp business operates as follows. S&H sells its stamps to retailers, primarily to supermarkets and gas stations, at a cost of about $2.65 per 1200 stamps; retailers give the stamps to consumers (typically at a rate of one for each 10¢ worth of purchases) as a bonus for their patronage; consumers paste the stamps in books of 1,200 and exchange the books for "gifts" at any of 850 S&H Redemption Centers maintained around the country. Each book typically buys between $2.86 and $3.31 worth of merchandise depending on the location of the redemption center and type of goods purchased. Since its development of this cycle 75 years ago, S&H has sold over one trillion stamps and redeemed approximately 86% of them.

A cluster of factors relevant to this litigation tends to disrupt this cycle and, in S&H's view, to threaten its business. An incomplete book has no redemption value. Even a complete book is of limited value because most "gifts" may be obtained only on submission of more than one book. For these reasons a collector of another type of stamps who has acquired a small number of green stamps may benefit by exchanging

with a green stamp collector who has opposite holdings and preferences. Similarly, because of the seasonal usefulness or immediate utility [2] of an object sought, a collector may want to buy stamps outright and thus put himself in a position to secure redemption merchandise immediately though it is "priced" beyond his current stamp holdings. Or a collector may seek to sell his stamps in order to use the resulting cash to make more basic purchases (food, shoes, etc.) than redemption centers normally provide.

Periodically over the past 70 years professional exchanges have arisen to service this demand. Motivated by the prospect of profit realizable as a result of serving as middlemen in swaps, the exchanges will sell books of S&H stamps previously acquired from consumers, or, for a fee, will give a consumer another company's stamps for S&H's or vice versa. Further, some regular merchants have offered discounts on their own goods in return for S&H stamps. Retailers do this as a means of competing with merchants in the area who issue stamps. By offering a price break in return for stamps, the redeeming merchant replaces the incentive to return to the issuing merchant (to secure more stamps so as to be able to obtain a gift at a redemption center) with the attraction of securing immediate benefit from the stamps by exchanging them for a discount at his store.[3]

S&H fears these activities because they are believed to reduce consumer proclivity to return to green-stamp-issuing stores and thus lower a store's incentive to buy and distribute stamps. The company attempts to pre-empt "trafficking" in its stamps by contractual pro-

[2] Often merchandise obtained by redemption is used as a gift.

[3] The efforts of some retailers to reissue S&H stamps are not involved in this case. The FTC explicitly left S&H free to seek injunctions against reissuance. 1 App. 169.

visions reflected in a notice on the inside cover of every S&H stamp book. The notice reads:

> "Neither the stamps nor the books are sold to merchants, collectors or any other persons, at all times the title thereto being expressly reserved in the Company . . . . The stamps are issued to you as evidence of cash payment to the merchants issuing the same. The only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption. You must not dispose of them or make any further use of them without our consent in writing. We will in every case where application is made to us give you permission to turn over your stamps to any other bona-fide collector of S&H Green . . . Stamps; but if the stamps or the books are transferred without our consent, we reserve the right to restrain their use by, or take them from other parties. It is to your interest that you fill the book, and personally derive the benefits and advantages of redeeming it." (Reproduced at 2 App. 230.)

S&H makes no effort to enforce this condition when consumers casually exchange stamps with each other, though reportedly some 20% of all the company's stamps change hands in this manner. But S&H vigorously moves against unauthorized commercial exchanges and redeemers. Between 1957 and 1965, by its own account the company filed for 43 injunctions against merchants who redeemed or exchanged its stamps without authorization, and it sent letters threatening legal action to 140 stamp exchanges and 175 businesses that redeemed S&H stamps. In almost all instances the threat or the reality of suit forced the businessmen to abandon their unauthorized practices.

II

The Reach of Section 5

The Commission presented two questions in its petition for certiorari, the first being "[w]hether Section 5 of the Federal Trade Commission Act, which directs the Commission to prevent 'unfair methods of competition . . . and unfair or deceptive acts or practices,' is limited to conduct which violates the letter or spirit of the antitrust laws." The other issue relates to the significance of state court holdings that the practices challenged here are lawful.[4] Neither question requests review of the Court of Appeals' decision that the business conduct proscribed by the Commission violates neither the letter nor spirit of the antitrust laws. Accordingly, we intimate no opinion on that issue and turn to the question of the reach of § 5.

In reality, the question is a double one: First, does § 5 empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws? Second, does § 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition? We think the statute, its legislative history, and prior cases compel an affirmative answer to both questions.

When Congress created the Federal Trade Commission in 1914 and charted its power and responsibility

[4] Though the Court of Appeals referred to state and federal court decisions that approved S&H's practice, our reading of its opinion leaves no doubt that it did not reverse the FTC order on the erroneous theory that such determinations might foreclose a contrary FTC § 5 decision. We therefore put aside the Goverment's second question as irrelevant and focus on its first contention.

under § 5, it explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase "unfair methods of competition" by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply. Senate Report No. 597, 63d Cong., 2d Sess., 13 (1914), presents the reasoning that led the Senate Committee to avoid the temptations of precision when framing the Trade Commission Act:

> "The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others."

The House Conference Report was no less explicit. "It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task." H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 19 (1914). See also Rublee, The Original Plan and Early History of the Federal Trade Commission, 11 Acad. Pol. Sci. Proc. 666, 667 (1926); Baker & Baum, Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition, 7 Vill. L. Rev. 517 (1962).

Since the sweep and flexibility of this approach were thus made crystal clear, there have twice been judicial attempts to fence in the grounds upon which the FTC might rest a finding of unfairness. In *FTC* v. *Gratz*, 253 U. S. 421 (1920), the Court over the strong dissent of Mr. Justice Brandeis (who had been involved in drafting the Trade Commission Act), wrote that while the "exact meaning" of the phrase " 'unfair method of competition' . . . is in dispute," the only practices that were subject to this characterization were those that were "heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *Id.*, at 427. This view was reiterated in other opinions over the next decade. See, *e. g.*, *FTC* v. *Curtis Publishing Co.*, 260 U. S. 568 (1923), and *FTC* v. *Sinclair Refining Co.*, 261 U. S. 463, 475–476 (1923). The opinion of the Court of Appeals' majority, citing *Sinclair* in support of its narrow view of the FTC's leeway, is in the tradition of these authorities.

In *FTC* v. *Raladam Co.*, 283 U. S. 643 (1931), a unanimous Court held that: "The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree . . . . Unfair trade methods are not *per se* unfair methods of *competition.*" (Italics in original.) "It is obvious," the Court continued,

> "that the word 'competition' imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be,

> lessened or otherwise injured. It is that condition of affairs which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public. . . . If broader powers be desirable they must be conferred by Congress." *Id.*, at 647–649.

Neither of these limiting interpretations survives to buttress the Court of Appeals' view of the instant case. Even if the first line of cases, *Gratz* and its progeny, stood unimpaired, their deference to action taken to constrain "deception, bad faith, fraud or oppression" would grant the FTC greater power to set right what it perceives as wrong than the panel of the Court of Appeals acknowledges. But frequent opportunity for reconsideration has consistently and emphatically led this Court to the view that the perspective of *Gratz* is too confined. As we recently unanimously observed: "Later cases of this Court . . . have rejected the *Gratz* view and it is now recognized in line with the dissent of Mr. Justice Brandeis in *Gratz* that the Commission has broad powers to declare trade practices unfair." *FTC* v. *Brown Shoe Co.*, 384 U. S. 316, 320–321 (1966).

The leading case that recognized a role for the FTC beyond that mapped out in *Gratz*, *FTC* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304 (1934), also brought *Raladam* into question; on both counts it sets the standard by which the range of FTC jurisdiction is to be measured today. Keppel & Brothers sold penny candies in "break and take" packs, a form of merchandising that induced children to buy lesser amounts of concededly inferior candy in the hope of by luck hitting on bonus packs containing extra candy and prizes. The FTC issued a cease-and-desist order under § 5 on the theory that the popular marketing scheme con-

travened public policy insofar as it tempted children to gamble and compelled those who would successfully compete with Keppel to abandon their scruples by similarly tempting children.

The Court had no difficulty in sustaining the FTC's conclusion that the practice was "unfair," though any competitor could maintain his position simply by adopting the challenged practice. "[H]ere," the Court said, "the competitive method is shown to exploit consumers, children, who are unable to protect themselves .... [I]t is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy." *Id.*, at 313.

En route to this result the Court met Keppel's arguments that, absent an antitrust violation or at least incipient injury to competitors, *Gratz* and *Raladam* so straitjacketed the FTC that the Commission could not issue a cease-and-desist order proscribing even an immoral practice. It held:

> "Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation." *Id.*, at 310.

Thenceforth, unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce confined to purely competitive behavior.

The perspective of *Keppel,* displacing that of *Raladam,* was legislatively confirmed when Congress adopted the 1938 Wheeler-Lea amendment, 52 Stat. 111, to § 5. The amendment added the phrase "unfair or deceptive acts or practices" to the section's original ban on "unfair methods of competition" and thus made it clear that Congress, through § 5, charged the FTC with protecting consumers as well as competitors. The House Report on the amendment summarized congressional thinking: "[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." H. R. Rep. No. 1613, 75th Cong., 1st Sess., 3 (1937). See also S. Rep. No. 1705, 74th Cong., 2d Sess., 2–3 (1936).

Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[5]

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[5] The Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:

"(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law,

III

The general conclusion just enunciated requires us to hold that the Court of Appeals erred in its construction of § 5 of the Federal Trade Commission Act. Ordinarily we would simply reverse the judgment of the Court of Appeals insofar as it limited the unfair practices proscribed by § 5 to those contrary to the letter and spirit of the antitrust laws and we would remand the case for consideration of whether the challenged practices, though posing no threat to competition within the precepts of the antitrust laws, are nevertheless either (1) unfair methods of competition or (2) unfair or deceptive acts or practices.

What we deem to be proper concerns about the interaction of administrative agencies and the courts, however, counsels another course in this case. In this Court the Commission argues that, however correct the Court of Appeals may be in holding the challenged S&H practices beyond the reach of the letter or spirit of the antitrust laws, the Court of Appeals nevertheless

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statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking. 29 Fed. Reg. 8355 (1964).

S&H argues that a later portion of this statement commits the FTC to the view that misconduct in respect of the third of these criteria is not subject to constraint as "unfair" absent a concomitant showing of misconduct according to the first or second of these criteria. But all the FTC said in the statement referred to was that "[t]he wide variety of decisions interpreting the elusive concept of unfairness *at least* makes clear that a method of selling violates Section 5 if it is exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others." *Ibid.* (emphasis added).

erred in asserting that the FTC could measure and ban conduct only according to such narrow criteria. Proceeding from this premise, with which we agree, the Commission's major submission is that its order is sustainable as a proper exercise of its power to proscribe practices unfair to consumers. Its minor position is that it also properly found S&H's practices to be unfair competitive methods apart from their propriety under the antitrust laws.

The difficulty with the Commission's position is that we must look to its opinion, not to the arguments of its counsel, for the underpinnings of its order. "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Investment Co. Institute* v. *Camp*, 401 U. S. 617, 628 (1971). We cannot read the FTC opinion on which the challenged order rests as premised on anything other than the classic antitrust rationale of restraint of trade and injury to competition.

The Commission urges reversal of the Court of Appeals and approval of its own order because, in its words, "[t]he Act gives the Commission comprehensive power to prevent trade practices which are deceptive or unfair to consumers, regardless of whether they also are anticompetitive." Brief for the FTC 15. It says the Court of Appeals was "wrong in two ways: you can have an anticompetitive impact that is not a violation of the antitrust laws and violate Section 5. You can also have an impact upon consumers without regard to competition and you can uphold a Section 5 violation on that ground." Tr. of Oral Arg. 18. Though completely accurate, these statements cannot be squared with the Commission's holding that "[i]t is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an

impairment of competition," Opinion of Commission, 1 App. 175; its conclusion that "[r]espondent . . . prevents . . . competitive reaction[s] and thereby it has restrained trade. We believe this is an unfair method of competition and an unfair act and practice in violation of Section 5 of the Federal Trade Commission Act and so hold," 1 App. 178; its observation that:

> "Respondent's individual acts and its acts with others taken to suppress trading stamp exchanges and other stamp redemption activity are all part of a clearly defined restrictive policy pursued by the respondent. In the circumstances surrounding this particular practice it is difficult to wholly separate the individual acts from the collective acts for the purpose of making an analysis of the consequences under the antitrust laws." 1 App. 179;

and like statements throughout the opinion, see, *e. g.*, 1 App. 176–178, *passim*.

There is no indication in the Commission's opinion that it found S&H's conduct to be unfair in its effect on competitors because of considerations other than those at the root of the antitrust laws.[6] For its part, the

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[6] The Commission did explicitly decline to assess S&H's conduct in light of one leading antitrust case. In *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 379 (1967), this Court held that: "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. *White Motor* [v. *United States*, 372 U. S. 253 (1963)]; *Dr. Miles* [*Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373 (1911)]. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale."

Arguably, S&H's practice is proscribed by this doctrine. When the FTC declined to rely on this precedent, however, it did so not

theory that the FTC's decision is derived from its concern for consumers finds support in only one line of the Commission's opinion. The Commission's observation that S&H's conduct limited "stamp collecting consumers' . . . freedom of choice in the disposition of trading stamps," 1 App. 176, will not alone support a conclusion that the FTC has found S&H guilty of unfair practices because of damage to consumers.

Arguably, the Commission's findings, in contrast to its opinion, go beyond concern with competition and address themselves to noncompetitive and consumer injury as well. It may also be that such findings would have evidentiary support in the record. But even if the findings were considered to be adequate foundation for an opinion and order resting on unfair consequences to consumer interests, they still fail to sustain the Commission action; for the Commission has not rendered an opinion which, by the route suggested, links its findings and its conclusions. The opinion is barren of any attempt to rest the order on its assessment of particular competitive practices or considerations of consumer interests independent of possible or actual effects on competition. Nor were any standards for doing so referred to or developed.

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to turn to considerations other than those embedded in the antitrust laws, but instead to look for considerations less "technical" and more deeply rooted in antitrust policy:

"We do not believe it appropriate to decide the broad competitive questions presented in this record on the narrow and technical basis of a restraint on alienation. The circumstances here are much different from that where products are transferred to a dealer for resale. They are complicated by the nature of the trading stamp scheme. It is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an impairment of competition. Thus, we intend to look at the substance of the allegedly illegal practice rather than to decide the case by application of a technical formula." 1 App. 175–176.

Our view is that "the considerations urged here in support of the Commission's order were not those upon which its action was based." *SEC* v. *Chenery Corp.*, 318 U. S. 80, 92 (1943). At the least the Commission has failed to "articulate any rational connection between the facts found and the choice made." *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 168 (1962).

The Commission's action being flawed in this respect, we cannot sustain its order. "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Chenery, supra,* at 94. *Burlington Truck Lines, supra,* at 169. A court cannot label a practice "unfair" under 15 U. S. C. § 45 (a)(1). It can only affirm or vacate an agency's judgment to that effect. "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." *Chenery, supra,* at 88. And as was repeated on other occasions:

> "For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate (see *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197), the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' 332 U. S., at 196." *Burlington Truck Lines, supra,* at 169.

In these circumstances, because the Court of Appeals' judgment that S&H's practices did not violate either the letter or the spirit of the antitrust laws was not attacked and remains undisturbed here, and because the Commis-

sion's order could not properly be sustained on other grounds, the judgment of the Court of Appeals setting aside the Commission's order is affirmed. The Court of Appeals erred, however, in its construction of § 5; had it entertained the proper view of the reach of the section, the preferable course would have been to remand the case to the Commission for further proceedings. *Chenery, supra,* at 95; *Burlington, supra,* at 174; *FPC* v. *United Gas Pipe Line Co.,* 393 U. S. 71 (1968). Accordingly, the judgment of the Court of Appeals is modified to this extent and the case is remanded to the Court of Appeals with instructions to remand it to the Commission for such further proceedings, not inconsistent with this opinion, as may be appropriate.

So ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

Syllabus

HAWAII *v.* STANDARD OIL CO. OF CALIFORNIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70–49. Argued October 21, 1971—Decided March 1, 1972

Section 4 of the Clayton Act does not authorize a State to sue for damages for an injury to its general economy allegedly attributable to a violation of the antitrust laws. Pp. 257–266.

431 F. 2d 1282, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 266. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined *post*, p. 270. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Maxwell M. Blecher argued the cause for petitioner. With him on the briefs were *Bertram Kanbara*, Attorney General of Hawaii, *Hiromu Suzawa*, Acting Attorney General, *George Pai*, Deputy Attorney General, *Joseph L. Alioto*, and *Peter J. Donnici*.

Francis R. Kirkham argued the cause for respondents. With him on the brief were *Richard J. MacLaury*, *Moses Lasky*, *Malcolm T. Dungan*, and *William Simon*.

Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger*, Attorney General of California, and *Anthony C. Joseph*, *Robert Murphy*, *Herbert Davis*, *Michael I. Spiegel*, and *Carole A. Kornblum*, Deputy Attorneys General, for the State of California, and by the Attorneys General and other officials for their respective States and jurisdictions as follows: *William T. Baxley*, Attorney General of Alabama, *Gary K. Nelson*, Attorney General of Arizona, *Ray Thornton*, Attorney General of Arkansas, *Duke W. Dunbar*, Attorney General of Colorado, *Robert K. Killian*, Attorney General of Connecticut, *W. Laird Stabler, Jr.*, Attorney General

of Delaware, *Robert L. Shevin*, Attorney General of Florida, *W. Anthony Park*, Attorney General of Idaho, *William J. Scott*, Attorney General of Illinois, *Richard C. Turner*, Attorney General of Iowa, *Vern Miller*, Attorney General of Kansas, *John B. Breckinridge*, Attorney General of Kentucky, *Jack P. F. Gremillion*, Attorney General of Louisiana, *James S. Erwin*, Attorney General of Maine, *Robert H. Quinn*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Warren Spannaus*, Attorney General of Minnesota, *John C. Danforth*, Attorney General of Missouri, *Robert L. Woodahl*, Attorney General of Montana, *Robert List*, Attorney General of Nevada, *Warren B. Rudman*, Attorney General of New Hampshire, *George F. Kugler, Jr.*, Attorney General of New Jersey, *David L. Norvell*, Attorney General of New Mexico, *Louis J. Lefkowitz*, Attorney General of New York, *Helgi Johanneson*, Attorney General of North Dakota, *William J. Brown*, Attorney General of Ohio, *Larry Derryberry*, Attorney General of Oklahoma, *Richard J. Israel*, Attorney General of Rhode Island, *Gordon Mydland*, Attorney General of South Dakota, *David M. Pack*, Attorney General of Tennessee, *Crawford C. Martin*, Attorney General of Texas, *Vernon B. Romney*, Attorney General of Utah, *James M. Jeffords*, Attorney General of Vermont, *Andrew P. Miller*, Attorney General of Virginia, *Slade Gorton*, Attorney General of Washington, *Chauncey H. Browning, Jr.*, Attorney General of West Virginia, *Robert W. Warren*, Attorney General, and *George F. Sieker*, Assistant Attorney General, of Wisconsin, and *J. Lee Rankin* of the City of New York.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue presented by this case is whether § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, authorizes a

State to sue for damages for an injury to its economy allegedly attributable to a violation of the antitrust laws of the United States. We hold that it does not.

I. Procedural History

Hawaii filed its initial complaint on April 1, 1968, against three of the four respondents.[1] On May 24, 1968, and again on August 19, 1968, Hawaii filed amended complaints. The third amended complaint filed on September 6, 1968, raised for the first time the issue presented herein. That complaint named all four respondents as defendants and charged them with violating the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, in the following ways: by entering into unlawful contracts; by conspiring and combining to restrain trade and commerce in the sale, marketing, and distribution of refined petroleum products; and by attempting to monopolize and actually monopolizing said trade and commerce.[2] The State sought to recover damages in three distinct capacities: in its proprietary capacity for overcharges for petroleum products sold to the State itself (first count); as *parens patriae* for similar overcharges paid by the citizens of the State (second count); and as the representative of the class of all purchasers in Hawaii for identical overcharges (third count).

The second count read, in relevant part:

> "18. The above-named plaintiff [Hawaii], [acts] in its capacity as *parens patriae,* and/or as trustee

[1] Chevron Asphalt Co. was not named as a defendant in the initial complaint. As pointed out in the text, *infra,* the company was named as a defendant in the third and fourth amended complaints which raise the question presented to the Court.

[2] In the third amended complaint, the State abandoned a claim made in the initial complaint that the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (a), had been violated. This claim has not been resurrected in any of the later stages of the proceedings.

for the use of its citizens who purchased refined petroleum products, from any defendant or co-conspirator herein . . . .

"19. The unlawful contracts, combination, conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize, and monopolization have resulted in the plaintiff, . . . and in its citizens, paying more for refined petroleum products than would have been paid in a freely operating competitive market. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens, however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein."

Very similar language appeared in the class-action count. In all three counts, the State sought both injunctive and monetary relief.

After each of the respondents moved to dismiss the second and third counts of the complaint, the District Court held a hearing to determine the propriety of the State's suing on behalf of its citizens. With respect to count two, the court held that Hawaii "has not even alleged an interest in its citizens' claims, much less interest of its own aside from the State's proprietary rights," and granted the motions to dismiss.[3] Viewing the class action as being "overlapping, parallel and/or alternative to" the *parens patriae* claim, the court dismissed the third count as well.[4]

Hawaii filed its fourth amended complaint on February 27, 1969. This is the complaint with which we are concerned. Count one contains a reiteration of Hawaii's claim that in its proprietary capacity the State paid an

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[3] The opinion of the court is unreported, but is contained in App. 51–58.

[4] *Id.*, at 58.

excessive price for the petroleum products that it purchased from respondents. Count two states a new *parens patriae* claim, and count three is drawn as a class action.

The *parens patriae* claim is stated in the following manner:

> "19. The State of Hawaii, acting through its Attorney General, brings this action by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae,* trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws hereinbefore alleged.
>
> "20. The unlawful contracts, combination and conspiracy in restraint of trade, unlawful combination and conspiracy to monopolize and monopolization, hereinbefore alleged, have injured and adversely affected the economy and prosperity of the State of Hawaii in, among others, the following ways:
>
> "(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;
>
> "(b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income;
>
> "(c) opportunity in manufacturing, shipping and commerce have [*sic*] been restricted and curtailed;
>
> "(d) the full and complete utilization of the natural wealth of the State has been prevented;
>
> "(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;
>
> "(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

"(g) the Hawaii economy has been held in a state of arrested development.

"21. Plaintiff has not yet ascertained the precise extent of said damage to itself and its citizens; however, when said amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein."

The class-action count is similar to that in the third amended complaint. As in the previous complaint, Hawaii seeks both injunctive and monetary relief in each count.

Respondents moved to dismiss the second and third counts, and hearing was again had in the District Court. The class action was dismissed by the court on the ground that "under the circumstances . . . , the class action based upon the injury to every individual purchaser of gasoline in the State, . . . in the context of the pleadings, would be unmanageable." [5] In a rather extensive opinion, the court examined the law that has developed concerning suits by a State as *parens patriae* and denied the motions to dismiss the second count. 301 F. Supp. 982 (1969). Recognizing that the state of the law was unclear, the District Court certified its decision denying the motions to dismiss for an interlocutory appeal pursuant to 28 U. S. C. § 1292 (b).[6] On appeal, the United States Court of Appeals for the Ninth Circuit reversed the decision of the District Court and directed that the second count of the complaint be dismissed.[7] 431 F. 2d

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[5] Reporter's Tr. 154 (May 29, 1969).

[6] The District Court offered to certify its dismissal of Hawaii's class-action count, but Hawaii indicated its intention not to appeal the ruling. Since the ruling was not appealed it is not before the Court for review.

[7] Although the Court of Appeals directed that the count be dismissed in its entirety, the parties have not suggested that its decision foreclosed any relief the State might obtain by way of injunction.

1282 (1970). Certiorari was granted so that we might review this decision. 401 U. S. 936 (1971).

II. The State as Parens Patriae

The concept of *parens patriae* is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the "royal prerogative." Malina & Blechman, Parens Patriae Suits for Treble Damages Under the Antitrust Laws, 65 Nw. U. L. Rev. 193, 197 (1970) (hereinafter Malina & Blechman); State Protection of its Economy and Environment: Parens Patriae Suits for Damages, 6 Col. J. L. & Soc. Prob. 411, 412 (1970) (hereinafter State Protection). These powers and duties were said to be exercised by the King in his capacity as "father of the country." [8] Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves.[9] For example, Blackstone refers to the sovereign or his representative as "the general guardian of all infants, idiots, and lunatics," [10] and as the superintendent of "all charitable uses in the kingdom." [11] In the United States, the "royal prerogative" and the "parens patriae" function of the King passed to the States.

The nature of the *parens patriae* suit has been greatly expanded in the United States beyond that which existed in England. This expansion was first evidenced in *Louisiana* v. *Texas,* 176 U. S. 1 (1900), a case in which the State of Louisiana brought suit to enjoin officials of the State of Texas from so administering the Texas quarantine regulations as to prevent Louisiana mer-

[8] Malina & Blechman, at 197; State Protection, at 412.

[9] State Protection, at 412.

[10] 3 W. Blackstone, Commentaries *47.

[11] *Ibid.*

chants from sending goods into Texas. This Court recognized that Louisiana was attempting to sue, not because of any particular injury to a business of the State, but as *parens patriae* for all her citizens. 176 U. S., at 19. While the Court found that *parens patriae* could not properly be invoked in that case, the propriety and utility of *parens patriae* suits were clearly recognized.

This Court's acceptance of the notion of *parens patriae* suits in *Louisiana* v. *Texas* was followed in a series of cases: *Missouri* v. *Illinois,* 180 U. S. 208 (1901) (holding that Missouri was permitted to sue Illinois and a Chicago sanitation district on behalf of Missouri citizens to enjoin the discharge of sewage into the Mississippi River); *Kansas* v. *Colorado,* 206 U. S. 46 (1907) (holding that Kansas was permitted to sue as *parens patriae* to enjoin the diversion of water from an interstate stream); *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230 (1907) (holding that Georgia was entitled to sue to enjoin fumes from a copper plant across the state border from injuring land in five Georgia counties); *New York* v. *New Jersey,* 256 U. S. 296 (1921) (holding that New York could sue to enjoin the discharge of sewage into the New York harbor); *Pennsylvania* v. *West Virginia,* 262 U. S. 553 (1923) (holding that Pennsylvania might sue to enjoin restraints on the commercial flow of natural gas); and *North Dakota* v. *Minnesota,* 263 U. S. 365 (1923) (holding that Minnesota could sue to enjoin changes in drainage which increase the flow of water in an interstate stream).

These cases establish the right of a State to sue as *parens patriae* to prevent or repair harm to its "quasi-sovereign" interests.[12] They deal primarily with original

[12] Article III, § 2, of the Constitution confers original jurisdiction upon this Court over suits between States or by one State against a citizen of another State. In order to properly invoke this jurisdiction, the State must bring an action on its own behalf and not on

suits brought directly in this Court pursuant to Art. III, § 2, of the Constitution under common-law rights of action. The question in this case is not whether Hawaii may maintain its lawsuit on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under § 4 of the Clayton Act. Hence, Hawaii's claim cannot be resolved simply by reference to any general principles governing *parens patriae* actions.

The only time this Court has ever faced the question of what relief, if any, the antitrust laws offer a State suing as *parens patriae* was in *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945), the case relied on most heavily by the parties herein. In that case, Georgia sought to invoke the original jurisdiction of this Court by filing an amended bill of complaint against 20 railroads, alleging, in essence, that the railroads had conspired to restrain trade and to fix prices in a manner that would favor shippers in other States (particularly Northern States) to the detriment of Georgia shippers.

Like this suit, *Georgia* arose under the federal antitrust laws. It is plain from the face of the complaint that "[t]he prayer [was] for damages and for injunctive relief." 324 U. S., at 445. See *id.*, at 446–447, 450–451.[13] Georgia claimed that the conspiracy had

behalf of particular citizens. See, *e. g.*, *Louisiana* v. *Texas*, 176 U. S. 1 (1900); *New Hampshire* v. *Louisiana*, 108 U. S. 76 (1883); *Oklahoma* v. *Atchison, T. & S. F. R. Co.*, 220 U. S. 277 (1911). An action brought by one State against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals. See, *e. g.*, *New Hampshire* v. *Louisiana*, *supra*; *North Dakota* v. *Minnesota*, 263 U. S. 365, 376 (1923).

[13] It is evident from the bill of complaint that Georgia sought to sue in four slightly different capacities: its sovereign capacity (first count); as a quasi-sovereign (second count); its proprietary capacity (third count); and as protector of a general class of its citizens (fourth count). Damages were sought in each count, although treble damages were sought only on the last count.

severely damaged its economy and sought to recover damages on behalf of its citizens.

The Court upheld Georgia's claim as *parens patriae* with respect to injunctive relief, but had no occasion to consider whether the antitrust laws also authorized damages for an injury to the State's economy, since approval of the challenged rates by the Interstate Commerce Commission barred a damage recovery on the ground that such a remedy would have given Georgia shippers an unfair advantage over shippers from other States. See *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156 (1922). Nowhere in *Georgia* did the Court address itself to the question whether § 4 of the Clayton Act authorizes damages for an injury to the general economy of a State. Thus, the question presented here is open.

III. Hawaii and the Antitrust Laws

Hawaii grounds its claim for treble damages in § 4 of the Clayton Act, 15 U. S. C. § 15, which reads:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

This section is notably different from § 16 of the Clayton Act, 15 U. S. C. § 26, which provides for injunctive relief:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage

> by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . ."

Hawaii plainly qualifies as a person under both sections of the statute, whether it sues in its proprietary capacity or as *parens patriae*. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S., at 447. But the critical question is whether the injury asserted by Hawaii in its *parens patriae* count is an injury to its "business or property."

The legislative history of the Sherman and Clayton Acts is not very instructive as to why Congress included the "business or property" requirement in § 4, but not in § 16. The most likely explanation lies in the essential differences between the two remedies.

While the United States Government, the governments of each State, and any individual threatened with injury by an antitrust violation may all sue for injunctive relief against violations of the antitrust laws, and while they may theoretically do so simultaneously against the same persons for the same violations, the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one. This case illustrates the point well. The parties are in virtual agreement that whether or not Hawaii can sue for injunctive relief as *parens patriae* is of little consequence so long as it can seek the same relief in its proprietary capacity. While some theoretical differences may exist with respect to the parties capable of enforcing a *parens patriae* injunction as opposed to one secured by a State in its proprietary capacity, these differences are not crucial to the defendant in an antitrust case.

The position of a defendant faced with numerous claims for damages is much different. If the defendant

is sued by 100 different persons or by one person with 100 separate but cumulative claims, and each claim is for damages, the potential liability is obviously far greater than if only one of those persons sued on only one claim. Thus, there is a striking contrast between the potential impact of suits for injunctive relief and suits for damages.

Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. See *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 4 (1958). This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation. In enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as "private attorneys general." See, *e. g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 130–131 (1969); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 147 (1968) (Fortas, J., concurring in result).

Thus, § 4 permits Hawaii to sue in its proprietary capacity for three times the damages it has suffered from respondents' alleged antitrust violations.[14] The section

[14] It is true, as MR. JUSTICE BRENNAN suggests, that an injury to the State in its proprietary capacity, as alleged in count one of the complaint, affects the citizens in much the same way as an injury of the sort claimed by Hawaii here. Each has the effect of

gives the same right to every citizen of Hawaii with respect to any damage to business or property. Were we, in addition, to hold that Congress authorized the State

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increasing taxes, or reducing government services, or both. But this does not mean that the two kinds of injuries are identical in nature. Where the injury to the State occurs in its capacity as a consumer in the marketplace, through a "payment of money wrongfully induced," *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, 396 (1906), damages are established by the amount of the overcharge. Under § 4, courts will not go beyond the fact of this injury to determine whether the victim of the overcharge has partially recouped its loss in some other way, even though a State, for example, may ultimately recoup some part of the overcharge through increased taxes paid by the seller. See *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 489 (1968). Measurement of an injury to the general economy, on the other hand, necessarily involves an examination of the impact of a restraint of trade upon every variable that affects the State's economic health—a task extremely difficult, "in the real economic world rather than an economist's hypothetical model." *Id.*, at 493.

The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. See, *e. g.*, *Miley* v. *John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299, 303 (Mass.), aff'd, 242 F. 2d 758 (CA1), cert. denied, 355 U. S. 828 (1957); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F. 2d 183 (CA2 1970), cert. denied, 401 U. S. 923 (1971); *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F. 2d 727, 732–734 (CA3 1970), cert. denied, 401 U. S. 974 (1971); *South Carolina Council* v. *Newton*, 360 F. 2d 414, 419 (CA4), cert. denied, 385 U. S. 934 (1966); *Dailey* v. *Quality School Plan, Inc.*, 380 F. 2d 484 (CA5 1967); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383, 395 (CA6 1962), cert. denied, 372 U. S. 907 (1963); *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564, 566–567 (CA7), cert. denied *sub nom. Illinois* v. *Commonwealth Edison Co.*, 375 U. S. 834 (1963); *Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.*, 368 F. 2d 679, 688–689 (CA8 1966); *Hoopes* v. *Union Oil Co.*, 374 F. 2d 480, 485 (CA9 1967); *Nationwide Auto App. Serv.* v. *Association of C. & S. Co.*, 382 F. 2d 925, 928–929 (CA10 1967).

to recover damages for injury to its general economy, we would open the door to duplicative recoveries.

A large and ultimately indeterminable part of the injury to the "general economy," as it is measured by economists, is no more than a reflection of injuries to the "business or property" of consumers, for which they may recover themselves under § 4. Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State. At the very least, if the latter type of injury is to be compensable under the antitrust laws, we should insist upon a clear expression of a congressional purpose to make it so, and no such expression is to be found in § 4 of the Clayton Act.

Like the lower courts that have considered the meaning of the words "business or property," we conclude that they refer to commercial interests or enterprises. See, *e. g.*, *Roseland* v. *Phister Mfg. Co.*, 125 F. 2d 417 (CA7 1942); *Hamman* v. *United States*, 267 F. Supp. 420 (Mont. 1967), appeal dismissed, 399 F. 2d 673 (CA9 1968); *Broadcasters, Inc.* v. *Morristown Broadcasting Corp.*, 185 F. Supp. 641 (NJ 1960). When the State seeks damages for injuries to its commercial interests, it may sue under § 4. But where, as here, the State seeks damages for other injuries, it is not properly within the Clayton Act.

Support for this reading of § 4 is found in the legislative history of 15 U. S. C. § 15a,[15] which is the only

[15] "Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor . . . , and shall recover actual damages by it sustained and the cost of suit." 69 Stat. 282, 15 U. S. C. § 15a.

This section was enacted in 1955 following the decision in *United States* v. *Cooper Corp.*, 312 U. S. 600 (1941), which held that the United States was not a "person" within the meaning of § 7 of the

provision authorizing recovery in damages by the United States, and which limits that recovery to damages to "business or property." The legislative history of that provision makes it quite plain that the United States was authorized to recover, not for general injury to the national economy or to the Government's ability to carry out its functions, but only for those injuries suffered in its capacity as a consumer of goods and services.

> "The United States is, of course, amply equipped with the criminal and civil process with which to enforce the antitrust laws. The proposed legislation, quite properly, treats the United States solely as a buyer of goods and permits the recovery of the actual damages suffered." S. Rep. No. 619, 84th Cong., 1st Sess., 3 (1955).

See also H. R. Rep. No. 422, 84th Cong., 1st Sess., 2–5 (1955). In light of the language used as well as the legislative history of 15 U. S. C. § 15a, it is manifest that the United States cannot recover for economic injuries to its sovereign interests, as opposed to its proprietary functions. And the conclusion is nearly inescapable that § 4, which uses identical language, does not authorize recovery for economic injuries to the sovereign interests of a State.

We note in passing the State's claim that the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damage actions, and thus that denying Hawaii the right to sue for injury to her quasi-sovereign interests will allow antitrust violations to go virtually unremedied. Private citizens are not as powerless, however, as the State suggests.

Sherman Act (the predecessor of § 4 of the Clayton Act). Recovery is limited to actual rather than treble damages because Congress reasoned that the United States, unlike a private party, needed no extraordinary incentive to bring antitrust suits. H. R. Rep. No. 422, 84th Cong., 1st Sess., 3 (1955).

Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U. S. C. § 1337; 15 U. S. C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. The District Court dismissed Hawaii's class action only because it was unwieldy; it did not hold that a State could never bring a class action on behalf of some or all of its consumer citizens. Respondents, in moving to dismiss count three of the fourth amended complaint, in which the State sought to bring such an action, virtually conceded that class actions might be appropriate under certain circumstances. The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.

Parens patriae actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries.

The judgment of the Court of Appeals is affirmed for the reasons stated above.

So ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

Today's decision reflects a miserly approach to the fashioning of federal remedies rectifying injuries to the collective interests of the citizens of a State through

action by the State itself. It is reminiscent of the ill-starred decision in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493.[1]

Hawaii, in her fourth amended complaint, sues for damages and injunctive relief as *parens patriae* by virtue of her "duty to protect the general welfare of the State and its citizens." She alleges that the alleged conspiracy among the respondent oil companies has "injured and adversely affected the economy and prosperity" of Hawaii as follows:

> "(a) revenues of its citizens have been wrongfully extracted from the State of Hawaii;
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> "(b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income;
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> "(c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;
>
> "(d) the full and complete utilization of the natural wealth of the State has been prevented;
>
> "(e) the high cost of manufacture in Hawaii has precluded goods made there from equal competitive access with those of other States to the national market;
>
> "(f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;

[1] In *Wyandotte*, the Court refused to exercise its conceded original jurisdiction over an original complaint filed by the State of Ohio to enjoin alleged pollution of Lake Erie by manufacturing plants in Michigan and Ontario, Canada, because "as a practical matter, it would be inappropriate for this Court to attempt to adjudicate the issues . . . ." 401 U. S., at 501. In the light of our rules permitting the appointment of special masters, however, this rationale is questionable at best. *Id.*, at 510–512 (DOUGLAS, J., dissenting). See generally Woods & Reed, The Supreme Court and Interstate Environmental Quality: Some Notes on the *Wyandotte* Case, 12 Ariz. L. Rev. 691 (1970).

"(g) the Hawaii economy has been held in a state of arrested development."

I see no way of distinguishing the instant case from *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439. The *Georgia* case held that a State may sue as *parens patriae* under the antitrust laws for injury to the economy of the State resulting from a conspiracy to restrain trade and commerce through the fixing of railroad rates. *Id.*, at 446. As we said:

> "Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected." *Id.*, at 451.

So-called "growth," "progress," and "development" are more than symbols of power in modern society; they represent the goal which planners—private and public alike—establish and seek to attain. And the State plays an important, at times crucial, role in achieving that goal.[2] If Hawaii can sustain her allegations by proof,

[2] "In these three respects—as a clearing house for necessary institutional innovations; as an agency for resolution of conflicts among group interests; and as a major entrepreneur for the socially required infrastructure—the sovereign state assumes key importance in channeling the explosive impacts of continuous structural changes, in providing a proper framework in which these structural changes, proceeding at revolutionary speed, are contained and prevented from exploding into a civil war (as they sometimes may, and have). Thus, the high rate of change in economic structure is linked to the importance of the sovereign state as an organizing unit. It is not accidental that, in measuring and analyzing economic growth, we talk of the economic growth of *nations* and use *national* economic accounts. In doing so, we imply that the sovereign state is an

she establishes injury both as respects her tourism and her industry, her "growth" and her "development."

The Court of Appeals was "skeptical of the existence of an independent harm to the general economy." 431 F. 2d 1282, 1285. But as Alabama states in her brief *amicus:*

> "Economists have developed models for measuring the effects upon local economies from infusions or extractions of given sums of money from those economies. In short, a state's economy is susceptible of articulation and measurement."

Hawaii is the magnet of tourism and of industry as well. She measures the health of her economy by her economic growth. No one citizen can stand in her shoes in those respects, for she represents the collective. Those interests should be held to be the State's "business or property" interests, within the meaning of the Clayton Act, and not merely the plants, factories, or hotels which she may own as a proprietor. We held as much in the *Georgia* case. It is indisputable that if Hawaii does prove damages, *Georgia* authorizes recovery. For as MR. JUSTICE BRENNAN points out, Georgia was denied damages only because of a technicality irrelevant to the present case.

Injury to the collective will commonly include injury to members of the collective. In that event damages recovered by Hawaii could not later be recovered by individual entrepreneurs. It might, of course, be shown that the individual's loss for the period in question was distinct from any impact on the collective. Thus, if

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important factor in modern economic growth; that, given the transnational, worldwide character of the supply of useful knowledge and science, the major permissive factor of modern economic growth, the state unit, in adjusting economic and social institutions to facilitate and maximise application, plays a crucial supplementary role." S. Kuznets, Economic Growth of Nations 346–347 (1971).

Hawaii failed to prove that the alleged conspiracy damaged her economy, a single entrepreneur might still be able to prove that it drove him to the wall. The difficulties advanced in this regard are more imaginary than real. They are doubtless rationales that express a prejudice against liberal construction of the antitrust laws. Since a collective damage is alleged, I would allow the case to go to trial, saving to Congress the question whether § 4 of the Clayton Act should be restricted to a State's proprietary interests.

I would adhere to the *Georgia* case and allow Hawaii a chance to prove her charges and to establish the actuality of damages or the need for equitable relief.[3]

I would reverse the judgment and remand the case for trial.[4]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The State of Hawaii seeks treble damages and injunctive relief for an alleged conspiracy among respondents to monopolize and fix prices on the sale of petroleum

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[3] The question of injunctive relief concerns the meaning of § 16 of the Clayton Act which grants relief to any "person" against loss or damage by a violation of "the antitrust" laws. It is settled that a State is a "person" within the meaning of § 16. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 452. Hence, it is clear that even if Hawaii does not prove damages, equitable relief is available as it was in the *Georgia* case.

[4] My quarrel with the Court does not extend to its approving reference to the possibility that Hawaii may yet be able to maintain a class action on behalf of her consumers, *ante*, at 266. Cf. Comment, Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws, 43 S. Cal. L. Rev. 570, 580–583 (1970). The District Court's dismissal of Hawaii's class action count as "unmanageable" was not certified for interlocutory appeal, and Hawaii's rights under Fed. Rule Civ. Proc. 23 are not before us for review.

products in the State. Count one of Hawaii's complaint alleges an economic injury to the State in its proprietary capacity as purchaser of those products. Count two states a claim by the State, as *parens patriae,* for injury to its "economy and prosperity," including the withdrawal of its citizens' revenues, increased taxes to offset such losses, curtailment of manufacturing, shipping, and commerce, and injury to the competitive position of Hawaiian goods in the national market. Count three alleges a class action on behalf of all purchasers in the State of respondents' petroleum products. The District Court dismissed count three as unmanageable, but denied respondents' motion to dismiss Count two, the *parens patriae* claim. An interlocutory appeal was taken by respondents under 28 U. S. C. § 1292 (b), and the Court of Appeals for the Ninth Circuit reversed and ordered dismissal of count two. The Court of Appeals held that even if the State's economy might suffer injury from antitrust violations independent of the injury suffered by private persons, that injury would not be to the State's "business or property" within the meaning of § 4 of the Clayton Act, and in any event would be too remote from respondents' alleged violations to permit the State to recover as *parens patriae.*

Georgia v. *Pennsylvania R. Co.,* 324 U. S. 439 (1945), in my view, requires reversal. In that case the State of Georgia sought to invoke the original jurisdiction of this Court to remedy a conspiracy by several railroads to fix rates on the transportation of goods to and from the State. As noted by the Court, *ante,* at 259 n. 13, Georgia sought damages in each of the four counts of its complaint—in its sovereign capacity, as a quasi-sovereign, in its proprietary capacity, and as representative of its citizens. Treating the complaint as a prayer "for damages and for injunctive relief," 324

U. S., at 445, the Court held that Georgia, both as *parens patriae* and proprietor, was an appropriate party to bring these claims:

> "The enforcement of the criminal sanctions of [the antitrust] acts has been entrusted exclusively to the federal government. See *Georgia* v. *Evans,* [316 U. S. 159,] 162. But when it came to other sanctions Congress followed a different course and authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae,* have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts." *Id.,* at 447.

Georgia was in fact denied damages, but only because such recovery might operate as an illegal rebate on rates already approved by the Interstate Commerce Commission. See *Keogh* v. *Chicago & Northwestern R. Co.,* 260 U. S. 156 (1922). Implicit in the decision, however, was the holding that Georgia, as *parens patriae,* could have recovered damages under the antitrust laws for a conspiracy involving other than agency-approved transportation charges. That holding applies with equal force here. Hawaii is complaining, not of an affront to its abstract sovereignty, but of the economic loss occasioned by respondents' conspiracy. As in *Georgia,* this can only be characterized as a wrong to the State "which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States." 324 U. S., at 451. If that injury would have been a sufficient basis for a damage claim by

Georgia, as we held in that case, then it supports an identical action by Hawaii here.

Even if *Georgia* were not dispositive, I would still find in Hawaii's *parens patriae* count a claim of injury to its "business or property" sufficient to state a claim under § 4. There runs through the Court's opinion an assumption that Hawaii's proprietary claims, though concededly sufficient to state a cause of action, are wholly distinct in concept from those raised by the State as *parens patriae*. While I agree that the two counts represent injuries to the State in separate capacities, the injuries themselves are not so unrelated as to justify a different treatment under the Clayton Act. In *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390 (1906), the city brought a treble-damages action against two pipe companies whose trust and combination had been invalidated in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211 (1899). Claiming injury " 'in its business or property,' " 203 U. S., at 395, the city sought damages in its capacity as a purchaser of water pipes for the municipal water system. In upholding the right of the city to bring that action, the Court stated:

> "It was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id.*, at 396.

See also *Georgia* v. *Evans*, 316 U. S. 159 (1942).

The determinant, then, is whether "property is diminished by a payment of money wrongfully induced." But what was the nature of the injury to property for which recovery was permitted in *Chattanooga?* Clearly it was nothing more than the added expense incurred by the city's treasury as the result of the antitrust violation.

While it was incurred in the course of a business transaction, the *harm* was to the economic wealth of the city's population as a whole, for any savings in public expenditures that ultimately accrued were for their benefit.

This is the same sort of interest sought to be protected here. Hawaii's economy, to which tourism and the tourist trade are important, would be particularly vulnerable to injury from a price conspiracy involving petroleum products. In seeking to preserve the economic opportunities of its people, and the tax revenues generated thereby, Hawaii is asserting an interest not significantly different in concept from that involved in *Chattanooga*. Whether the injury sought to be remedied consists of additional payments from the public purse, as in that case, or the failure to generate additional wealth, as here, the result in either instance is the same—the government and its population, as entities, have suffered harm to their economic well-being. If that harm is characterized "business or property" in one case, then we stretch no traditional property concepts in applying the same label in the other.*

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*The Court seems to concede as much in saying that an "injury to the State in its proprietary capacity . . . affects the citizens in much the same way as an injury of the sort claimed by Hawaii here." *Ante*, at 262 n. 14. Yet because the assessment of damages might prove more difficult in a *parens patriae* than a proprietary action, the Court concludes that "the two kinds of injuries are [not] identical in nature." *Id.*, at 263 n. 14. The Court plainly confuses two separate issues. The injury to Hawaii's general economy may present problems of proof not raised in its proprietary action, but a mere difficulty in the assessment of damages cannot change the *nature* of the damage claimed. In short, I think that Hawaii has alleged an injury to its "business or property," and, on the entirely separate question of proving damages, agree with my Brother DOUGLAS that the injury can be quantified, or at least approximated.

This conclusion is not undercut by 15 U. S. C. § 15a, which limits recovery by the United States for injury to its "business or property" caused by a violation of the antitrust laws to "actual damages suffered" "solely as a buyer of goods." S. Rep. No. 619, 84th Cong., 1st Sess., 3 (1955). Nothing in the Act similarly restricts a *State,* suing as *parens patriae.* As the legislative history of § 15a shows, the major emphasis during passage of the Sherman Act was on the methods of its enforcement. "[I]t was believed that the most effective method, in addition to the imposition of penalties by the United States, was to provide for private treble-damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the Government time and money." *Id.,* at 2. Thus private litigants, encouraged by the hope of triple recovery, were seen as a major instrument of antitrust enforcement, supplemented by criminal prosecutions and civil forfeiture actions brought by the Federal Government. These remedies did not, however, adequately protect the Government as the volume of its procurement grew and collusion among its suppliers became increasingly evident. This was the mischief Congress enacted § 15a to curb:

> "The American taxpayer is entitled to full value for his tax dollar. He should be protected against its going into the pockets of wrongdoers in the form of excessive prices and profits gained through violation of the antitrust laws. If he were spending the money himself, he could sue for triple damages. Surely, he is entitled to protection from actual loss where the Government spends it for him. By permitting the United States Government to recover the provable damages resulting from

> unlawful practices engaged in by those with whom it does business, [§ 15a] would afford those safeguards necessary to the Public Treasury and at the same time severely deter those who would conspire in their dealings with Federal departments." H. R. Rep. No. 422, 84th Cong., 1st Sess., 4–5 (1955).

At the same time, however, Congress felt that "unlike the situation with respect to private persons, there is no need to furnish the Government any special incentive to enforce the antitrust laws, a heavy responsibility with which it is already charged," and therefore Congress granted "to the Government the right to recover only actual, as distinguished from treble, damages." *Id.*, at 4. In addition, Congress felt that the United States was "amply equipped with the criminal and civil process with which to enforce the antitrust laws. The proposed legislation, quite properly, treats the United States solely as a buyer of goods and permits the recovery of the actual damages suffered." S. Rep. No. 619, *supra*, at 3.

Thus § 15a served a narrower purpose than the treble-damages provisions of the Sherman and Clayton Acts. The United States was "amply equipped" with "criminal and civil process" for general enforcement, and needed a damage remedy solely to protect itself "as a buyer of goods." On the other hand private litigants, including the States, lacked the Government's "criminal and civil process." Yet they were viewed as primary enforcers of antitrust policy and were armed with the weapon of triple recovery as a means of stimulating their efforts. It is plain from the history of § 15a that Congress did not intend the States to be denied the treble-damages remedy Hawaii pursues here.

Finally, this result does not necessarily lead to double recovery. Since Hawaii is by definition asserting claims "independent of and behind the titles of its citizens,"

Georgia v. *Tennessee Copper Co.*, 206 U. S. 230, 237 (1907), there may be excluded from its recovery any monetary damages that might be claimed by its citizens individually or as part of a properly constituted class. That problem, like uncertainty of damages, is better answered after trial than on the pleadings.

In sum, I think that since no one questions that Hawaii can maintain a treble-damages action in its proprietary capacity, for analogous reasons, Hawaii may also maintain the action pleaded in count two as *parens patriae*.

ADAMS *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 70–5038. Argued December 7, 1971—Decided March 6, 1972

Petitioner's pretrial motion to dismiss the indictment against him because of the court's failure to appoint counsel to represent him at the preliminary hearing in 1967 was denied, and petitioner was tried and convicted. The Illinois Supreme Court affirmed on the ground that *Coleman* v. *Alabama*, 399 U. S. 1, in which this Court held that a preliminary hearing is a critical stage of the criminal process at which the accused is constitutionally entitled to assistance of counsel, did not have retroactive application. *Held:* The judgment is affirmed. Pp. 280–286.

46 Ill. 2d 200, 263 N. E. 2d 490, affirmed.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE WHITE, concluded that *Coleman* v. *Alabama*, *supra*, does not apply retroactively to preliminary hearings conducted before June 22, 1970, when *Coleman* was decided. Pp. 280–285.

MR. CHIEF JUSTICE BURGER concurred in the result, concluding, as set forth in his dissent in *Coleman*, that there is no *constitutional* requirement that counsel should be provided at preliminary hearings. Pp. 285–286.

MR. JUSTICE BLACKMUN concurred in the result, concluding that *Coleman* was wrongly decided. P. 286.

BRENNAN, J., announced the Court's judgment and delivered an opinion, in which STEWART and WHITE, JJ., joined. BURGER, C. J., filed an opinion concurring in the result, *post*, p. 285. BLACKMUN, J., filed a statement concurring in the result, *post*, p. 286. DOUGLAS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 286. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Edward M. Genson argued the cause for petitioner. With him on the brief were *Charles B. Evins, R. Eugene Pincham,* and *Sam Adam.*

E. James Gildea argued the cause for respondent. On the brief were *William J. Scott,* Attorney General of

Illinois, *Joel M. Flaum,* First Assistant Attorney General, and *James B. Zagel* and *James R. Streicker,* Assistant Attorneys General.

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion, in which MR. JUSTICE STEWART and MR. JUSTICE WHITE join.

In *Coleman* v. *Alabama,* 399 U. S. 1, decided June 22, 1970, we held that a preliminary hearing is a critical stage of the criminal process at which the accused is constitutionally entitled to the assistance of counsel. This case presents the question whether that constitutional doctrine applies retroactively to preliminary hearings conducted prior to June 22, 1970.

The Circuit Court of Cook County, Illinois, conducted a preliminary hearing on February 10, 1967, on a charge against petitioner of selling heroin. Petitioner was not represented by counsel at the hearing. He was bound over to the grand jury, which indicted him. By pretrial motion he sought dismissal of the indictment on the ground that it was invalid because of the failure of the court to appoint counsel to represent him at the preliminary hearing. The motion was denied on May 3, 1967, on the authority of *People* v. *Morris,* 30 Ill. 2d 406, 197 N. E. 2d 433 (1964). In *Morris* the Illinois Supreme Court held that the Illinois preliminary hearing was not a critical stage at which the accused had a constitutional right to the assistance of counsel. Petitioner's conviction was affirmed by the Illinois Supreme Court, which rejected petitioner's argument that the later *Coleman* decision required reversal. The court acknowledged that its *Morris* decision was superseded by *Coleman,*[1] but

[1] The Illinois Supreme Court stated, 46 Ill. 2d, at 205–206, 263 N. E. 2d, at 493,

"A preliminary hearing in Alabama, as in Illinois, has the purpose of determining whether there is probable cause to believe an offense

held that *Coleman* applied only to preliminary hearings conducted after June 22, 1970, the date *Coleman* was decided. 46 Ill. 2d 200, 263 N. E. 2d 490 (1970). We granted certiorari limited to the question of the retroactivity of *Coleman*. 401 U. S. 953 (1971). We affirm.

The criteria guiding resolution of the question of the retroactivity of new constitutional rules of criminal procedure "implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967). We have given complete retroactive effect to the new rule, regardless of good-faith reliance by law enforcement authorities or the degree of impact on the administration of justice, where the "major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials . . . ." *Williams* v. *United States*, 401 U. S. 646, 653 (1971). Examples are the right to counsel at trial, *Gideon* v.

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has been committed by the defendant . . . . In both States the hearing is not a required step in the process of prosecution, as the prosecutor may seek an indictment directly from the grand jury, thereby eliminating the proceeding. . . . In neither State is a defendant required to offer defenses at the hearing at the risk of being precluded from raising them at the trial itself. . . . We conclude that the preliminary hearing procedures of Alabama and Illinois are substantially alike and we must consider because of *Coleman* v. *Alabama* . . . that a preliminary hearing conducted pursuant to section 109–3 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 109–3) is a 'critical stage' in this State's criminal process so as to entitle the accused to the assistance of counsel."

A right to a preliminary hearing has been constitutionally established, effective July 1, 1971. Illinois Constitution of 1970, Art. I, § 7.

Wainwright, 372 U. S. 335 (1963); on appeal, *Douglas* v. *California*, 372 U. S. 353 (1963); or at some forms of arraignment, *Hamilton* v. *Alabama*, 368 U. S. 52 (1961). See generally *Stovall* v. *Denno*, *supra*, at 297–298; *Williams* v. *United States*, *supra*, at 653 n. 6.

However, "the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree," *Johnson* v. *New Jersey*, 384 U. S. 719, 728–729 (1966); it is a "question of probabilities." *Id.*, at 729. Thus, although the rule requiring the assistance of counsel at a lineup, *United States* v. *Wade*, 388 U. S. 218 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967), is "aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence," we held that the probabilities of infecting the integrity of the truth-determining process by denial of counsel at the lineup were sufficiently less than the omission of counsel at the trial itself or on appeal that those probabilities "must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." *Stovall* v. *Denno*, *supra*, at 298.

We hold that similarly the role of counsel at the preliminary hearing differs sufficiently from the role of counsel at trial in its impact upon the integrity of the factfinding process as to require the weighing of the probabilities of such infection against the elements of prior justified reliance and the impact of retroactivity upon the administration of criminal justice. We may lay aside the functions of counsel at the preliminary hearing that do not bear on the factfinding process at trial—counsel's help in persuading the court not to hold the accused for the grand jury or meanwhile to admit the accused to bail. *Coleman*, 399 U. S., at 9. Of counsel's other functions—to "fashion a vital impeach-

ment tool for use in cross-examination of the State's witnesses at the trial," to "discover the case the State has against his client," "making effective arguments for the accused on such matters as the necessity for an early psychiatric examination . . . ," *ibid.*—impeachment and discovery may make particularly significant contribution to the enhancement of the factfinding process, since they materially affect an accused's ability to present an effective defense at trial. But because of limitations upon the use of the preliminary hearing for discovery and impeachment purposes, counsel cannot be as effectual as at trial or on appeal. The authority of the court to terminate the preliminary hearing once probable cause is established, see *People* v. *Bonner,* 37 Ill. 2d 553, 560, 229 N. E. 2d 527, 531 (1967), means that the degree of discovery obtained will vary depending on how much evidence the presiding judge receives. Too, the preliminary hearing is held at an early stage of the prosecution when the evidence ultimately gathered by the prosecution may not be complete. Cf. S. Rep. No. 371, 90th Cong., 1st Sess., 33, on amending 18 U. S. C. § 3060. Counsel must also avail himself of alternative procedures, always a significant factor to be weighed in the scales. *Johnson* v. *New Jersey,* 384 U. S., at 730. Illinois provides, for example, bills of particulars and discovery of the names of prosecution witnesses. Ill. Rev. Stat., c. 38, §§ 114–2, 114–9, 114–10 (1971). Pretrial statements of prosecution witnesses may also be obtained for use for impeachment purposes. See, *e. g., People* v. *Johnson,* 31 Ill. 2d 602, 203 N. E. 2d 399 (1964).

We accordingly agree with the conclusion of the Illinois Supreme Court, "On this scale of probabilities, we judge that the lack of counsel at a preliminary hearing involves less danger to 'the integrity of the truth-determining process at trial' than the omission of counsel at the trial

itself or on appeal. Such danger is not ordinarily greater, we consider, at a preliminary hearing at which the accused is unrepresented than at a pretrial line-up or at an interrogation conducted without presence of an attorney." 46 Ill. 2d, at 207, 263 N. E. 2d, at 494.[2]

We turn then to weighing the probabilities that the denial of counsel at the preliminary hearing will infect the integrity of the factfinding process at trial against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice. We do not think that law enforcement authorities are to be faulted for not anticipating *Coleman*. There was no clear foreshadowing of that rule. A contrary inference was not unreasonable in light of our decisions in *Hamilton* v. *Alabama*, 368 U. S. 52, and *White* v. *Maryland*, 373 U. S. 59 (1963). *Hamilton* denominated the arraignment stage in Alabama critical because defenses not asserted at that stage might be forever lost. *White* held that an uncounseled plea of guilty at a Maryland preliminary hearing could not be introduced by the State at trial. Many state courts not unreasonably regarded *Hamilton* and *White* as fashioning limited constitutional rules governing preliminary hearings. See, *e. g.*, the decision of the Illinois Supreme Court in *People* v. *Morris*, 30 Ill. 2d 406, 197 N. E. 2d 433. Moreover, a

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[2] Accord: *Phillips* v. *North Carolina*, 433 F. 2d 659, 662 (1970), where the Court of Appeals for the Fourth Circuit observed:

"To be sure, if a preliminary hearing is held, the accused gains important rights and advantages that can be effectively exercised only through his attorney. Counsel's function, however, differs from his function at trial. Broadly speaking, his role at the preliminary hearing is to advise, observe, discover the facts, and probe the state's case. In this respect he serves in somewhat the same capacity as counsel at lineups and interrogations, which are both pretrial stages of criminal proceedings where the right to counsel has not been held retroactive."

number of courts, including all of the federal courts of appeals had concluded that the preliminary hearing was not a critical stage entitling an accused to the assistance of counsel.[3] It is thus clear there has been understandable and widespread reliance upon this view by law enforcement officials and the courts.

It follows that retroactive application of *Coleman* "would seriously disrupt the administration of our criminal laws." *Johnson* v. *New Jersey*, 384 U. S., at 731. At the very least, the processing of current criminal calendars would be disrupted while hearings were conducted to determine whether the denial of counsel at the preliminary hearing constituted harmless error. Cf. *Stovall* v. *Denno*, 388 U. S., at 300. The task of conducting such hearings would be immeasurably complicated by the need to construct a record of what occurred. In Illinois, for example, no court reporter was present at pre-*Coleman* preliminary hearings and the proceedings are therefore not recorded. See *People* v. *Givans*, 83 Ill. App. 2d 423, 228 N. E. 2d 123 (1967). In addition, relief from this constitutional error would require not merely a new trial but also, at least in Illinois, a new preliminary hearing and a new indictment. The impact upon the administration of the criminal law of that requirement needs no elaboration. Therefore, here also, "[t]he unusual force of the countervailing considerations strengthens our con-

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[3] *Pagan Cancel* v. *Delgado*, 408 F. 2d 1018 (CA1 1969); *United States ex rel. Cooper* v. *Reincke*, 333 F. 2d 608 (CA2 1964); *United States ex rel. Budd* v. *Maroney*, 398 F. 2d 806 (CA3 1968); *DeToro* v. *Pepersack*, 332 F. 2d 341 (CA4 1964); *Walker* v. *Wainwright*, 409 F. 2d 1311 (CA5 1969); *Waddy* v. *Heer*, 383 F. 2d 789 (CA6 1967); *Butler* v. *Burke*, 360 F. 2d 118 (CA7 1966); *Pope* v. *Swenson*, 395 F. 2d 321 (CA8 1968); *Wilson* v. *Harris*, 351 F. 2d 840 (CA9 1965); *Latham* v. *Crouse*, 320 F. 2d 120 (CA10 1963); *Headen* v. *United States*, 115 U. S. App. D. C. 81, 317 F. 2d 145 (1963).

clusion in favor of prospective application." *Stovall* v. *Denno, supra,* at 299.

We do not regard petitioner's case as calling for a contrary conclusion merely because he made a pretrial motion to dismiss the indictment, or because his conviction is before us on direct review. "[T]he factors of reliance and burden on the administration of justice [are] entitled to such overriding significance as to make [those] distinction[s] unsupportable." *Stovall* v. *Denno, supra,* at 300–301. Petitioner makes no claim of actual prejudice constituting a denial of due process. Such a claim would entitle him to a hearing without regard to today's holding that *Coleman* is not to be retroactively applied. See *People* v. *Bernatowicz,* 35 Ill. 2d 192, 198, 220 N. E. 2d 745, 748 (1966); *People* v. *Bonner,* 37 Ill. 2d 553, 561, 229 N. E. 2d 527, 532 (1967).

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, concurring in the result.

I concur in the result but maintain the view expressed in my dissent in *Coleman* v. *Alabama,* 399 U. S. 1, 21 (1970), that while counsel should be provided at preliminary hearings as a matter of sound policy and judicial administration, there is no *constitutional* requirement that it be done. As I noted in *Coleman,* the constitutional command applies to "criminal prosecutions," not to the shifting notion of "critical stages." Nor can I join in the view that it is a function of constitutional adjudication to assure that defense counsel can "fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial" or "discover the case the State has against his client."

399 U. S., at 9. Nothing could better illustrate the extra-constitutional scope of *Coleman* than the interpretation of it now to explain why we do not make it "retroactive."

MR. JUSTICE BLACKMUN, concurring in the result.

Inasmuch as I feel that *Coleman* v. *Alabama*, 399 U. S. 1 (1970), was wrongly decided, I concur in the result.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

Until *Linkletter* v. *Walker*, 381 U. S. 618 (1965), the Court traditionally applied new constitutional criminal procedure standards to cases finalized and police practices operative before the promulgation of the new rules.[1] *Linkletter*, however, was the cradle of a new doctrine of nonretroactivity which exempts from relief the earlier victims of unconstitutional police practices. I have disagreed on numerous occasions with applications of various brands of this doctrine and I continue my dissent in this case.[2] My own view is that even-handed justice requires either prospectivity only[3] or complete retro-

[1] *E. g., Eskridge* v. *Washington Prison Board*, 357 U. S. 214 (1958); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Jackson* v. *Denno*, 378 U. S. 368 (1964), (see also *Desist* v. *United States*, 394 U. S. 244, 250 n. 15 (1969)); *Reck* v. *Pate*, 367 U. S. 433 (1961).

[2] *Linkletter* v. *Walker*, 381 U. S. 618, 640 (1965); *Tehan* v. *Shott*, 382 U. S. 406, 419 (1966); *Johnson* v. *New Jersey*, 384 U. S. 719, 736 (1966); *Stovall* v. *Denno*, 388 U. S. 293, 302 (1967); *DeStefano* v. *Woods*, 392 U. S. 631, 635 (1968); *Desist* v. *United States*, 394 U. S. 244, 255 (1969); *Halliday* v. *United States*, 394 U. S. 831, 835 (1969); *Mackey* v. *United States*, 401 U. S. 667, 713 (1971).

[3] It was suggested in *Stovall* v. *Denno*, *supra*, at 301, that a prospective-only holding would violate the Art. III requirement of case or controversy. But see *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 422 (1964), where the Court exempted the petitioner from its holding. See also *Johnson* v. *New Jersey*, *supra*, at 733.

activity. To me there is something inherently invidious as Mr. Justice Harlan phrased it, in "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule . . . ." *Mackey* v. *United States,* 401 U. S. 667, 679 (1971) (separate opinion). I agree with his critique, *id.,* at 695, that the purported distinction between those rules that are designed to improve the factfinding process and those designed to further other values was "inherently intractable" and to illustrate his point he adverted to the Court's difficulty in reconciling with its rule such nonretroactivity cases as *Johnson* v. *New Jersey,* 384 U. S. 719 (1966); *Stovall* v. *Denno,* 388 U. S. 293 (1967), and *DeStefano* v. *Woods,* 392 U. S. 631 (1968), all of which held nonretroactive decisions designed, in part, to enhance the integrity of the factfinding process. He also questioned the workability of any rule which requires a guess as to "whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle." *Mackey* v. *United States, supra,* at 695; *Desist* v. *United States,* 394 U. S. 244, 263 (1969). For example, as I suggest *infra,* at 293–295, a serious question arises in this case whether *Coleman* v. *Alabama,* 399 U. S. 1 (1970), should have been fully anticipated by state judicial authorities.[4]

[4] While I subscribe to many of the reservations expressed by Mr. Justice Harlan, I nonetheless find his alternative rule of retrospectivity unsatisfactory. In *Mackey* v. *United States,* 401 U. S. 667, 675 (1971) (separate opinion), he suggested that constitutional decisions be retroactive as to all nonfinal convictions pending at the time of the particular holdings, but that prisoners seeking habeas relief should generally be treated according to the law prevailing at the time of their convictions. It is on this latter score that I am troubled. Surely it would be no more facile a task to unearth the

Additionally, it is curious that the plurality rule is sensitive to "reasonable reliance" on prior standards by law enforcement agencies but is unconcerned about the

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state of law of years past than it is to assign, under the plurality's test, a degree of reasonableness to reliance on older standards by law enforcement agencies. Where the question has arisen in this Court, we have treated habeas petitioners by the modern law, not by older rules. See *Reck* v. *Pate*, 367 U. S. 433 (1961) (habeas permitted on basis of current law to release prisoner convicted in 1936). See also *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Jackson* v. *Denno*, 378 U. S. 368 (1964), announcing new rules in habeas cases. Moreover, as has been concluded by Professor Schwartz, the drawing of a bright line between federal review through habeas and certiorari would be unjustified:

"Where federal review of the constitutionality of state criminal proceedings is concerned, the making of so sharp a distinction between review on certiorari and habeas corpus is unwarranted. There is often no significant difference with respect to age and potential staleness between the two types of cases. Rather than coming years after the conviction is final, habeas corpus is often but a routine step in the criminal defense process—the normal step taken after certiorari has been denied. Sometimes, it actually replaces certiorari, for in *Fay v. Noia* [372 U. S. 391 (1963)] the Supreme Court advised criminal defendants to skip certiorari and to petition directly to the federal district court for habeas corpus. Even in situations in which a defendant goes through all the direct review steps, it is often nothing more than fortuitous circumstance which determines whether his case is still on direct review or is on collateral attack when the new decision comes down.

"The difference between review on certiorari and habeas corpus seems even less significant when we look to function and actual operation. Although it is sometimes considered the 'normal' method for obtaining federal review of state convictions, certiorari does not provide, as the Court remarked in *Fay v. Noia*, 'a normal appellate channel in any sense comparable to the writ of error,' for the Court must limit its jurisdiction to questions that have significance beyond the immediate case. Habeas corpus, on the other hand, facilitates the Court's task in those cases it does take by providing a record focused exclusively on the federal constitutional question. Habeas corpus has thus become the primary vehicle for immediate federal

unfairness of arbitrarily granting relief to Coleman but denying it to Adams.

Given my disagreement with the plurality's rule, I am reluctant even to attempt to apply it, but even by its own

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review of state convictions. Further, this development has resulted in a gradual shrinking of what were once significant operational differences between review on certiorari and habeas corpus, such as the relationship to the state proceeding, the degree of independent fact-finding authority, and the significance of the defendant's violation of state procedural rules. From both the functional and the operational standpoints, then, it is justifiable to conclude that 'the distinctions between habeas corpus proceedings and direct review are largely illusory.'

"In addition, drawing a line between review [on] certiorari and habeas corpus undercuts the Supreme Court's bypass suggestion in *Fay v. Noia*. If a defendant has doubts about the retroactivity of any claim which might both affect him and be subject to Court review in the foreseeable future, he will be well advised always to ignore the Court's suggestion and to apply for certiorari. Many months may pass before his petition for certiorari is rejected, and so long as it is pending, he will be entitled to receive the benefits of any intervening decisions. As soon as he files his petition for habeas corpus, however, even if he does so only a day after the last state court order is entered, he will have forfeited his right to such benefits. He will thus be put to an election between delayed relief and no relief at all.

"The inequity of drawing a sharp distinction between direct review and habeas corpus is, however, only one aspect of a broader inequity: treating two prisoners deprived of the same fundamental constitutional right differently merely because the Supreme Court did not get around to enunciating a particular right until after the conviction of one of them had become final. Professor Mishkin argues that worry about this point ignores 'the reasons for barring current convictions and . . . the fact that the new rule in no way undermines the earlier determinations of factual guilt.' To him, it is as if a guilty person were to complain of his lot because others equally guilty were not prosecuted. And though he recognizes that such claims are sometimes sustained, he concludes that 'there are certainly rational bases for drawing a line between current convictions and

terms, the balancing approach would appear to require that we hold *Coleman* retroactive. This conclusion reinforces my fear that the process is too imprecise as a neutral guide for either this Court or the lower courts and will invariably permit retroactivity decisions to turn on predilections, not principles.

I

In applying the rule, I am first troubled by the plurality's adoption of the finding of the court below that: "On [the] scale of probabilities, we judge that the lack of counsel at a preliminary hearing involves less danger to 'the integrity of the truth-determining process at trial' than the omission of counsel at the trial itself or on appeal." *Ante*, at 282–283. The same might have been said of the right to counsel at sentencing, *Mempa*

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those previously final,' citing excerpts from Professors Bator and Amsterdam on finality. Professor Mishkin's sharp distinction between collateral attack and direct review thus rests ultimately on finality considerations.

"Finality considerations seem especially weak where two cases differ only in the fact that one is still on 'direct' review whereas the other is not. Where the two cases are far apart in age, finality considerations are admittedly more persuasive. But even there, the mere timing of the Court's decision to grant federal protection to a fundamental right hardly seems to be a sufficient basis for unequal treatment; after all, in most instances it was not the older prisoner's fault that the Court did not render its decision earlier. To some extent, of course, the question comes down to a choice between the competing values of equality and repose, and choices of this sort are notoriously immune to reasoned resolution. It will be suggested below, however, that the threat to finality considerations from complete retroactivity appears to have been greatly exaggerated, and if this suggestion is well taken, Professor Mishkin's rejection of equality is especially untenable." Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719, 731–734 (1966).

v. *Rhay*, 389 U. S. 128 (1967), at certain arraignments, *Hamilton* v. *Alabama*, 368 U. S. 52 (1961), or at preliminary hearings where guilty pleas were taken, *White* v. *Maryland*, 373 U. S. 59 (1963), all of which have been held retroactive.[5]

Rather than reaching for these analogies, however, the plurality suggests that the danger to the integrity of the truth-determining process is no greater here than at a pretrial lineup or at an interrogation conducted without counsel. In relying on these analogies, the plurality gives short shrift to the argument that "in practice [the preliminary] hearing may provide the defense with the most valuable discovery technique available to him," *Wheeler* v. *Flood*, 269 F. Supp. 194, 198 (EDNY 1967), an objective which is not so readily achievable at lineups and interrogations at which counsel serves only a protective function. The State's access to superior investigative resources and its ability to keep its case secret until trial normally puts the defendant at a clear disadvantage.[6]

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[5] See *McConnell* v. *Rhay*, 393 U. S. 2 (1968) (*Mempa* retroactive); *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968) (*White* and *Hamilton* retroactive).

[6] The investigative advantage enjoyed by the State extends beyond the prohibition of the common law against criminal discovery. It also results from the fact that the police are usually first at the scene of the crime, have access to witnesses with fresher recollections, are authorized to confiscate removable evidence, are positioned to conduct laboratory tests on physical evidence, enjoy a communication channel with a complete undercover world of secret informers, have an air of legitimacy which is conducive to cooperation by witnesses, and have numerous ways to compel testimony even before trial. See generally Norton, Discovery in the Criminal Process, 61 J. Crim. L., C. & P. S. 11, 13–14 (1970); Comment, Criminal Law: Pre-Trial Discovery—The Right of an Indigent's Counsel to Inspect Police Reports, 14 St. Louis U. L. J. 310 (1969); Moore, Criminal Discovery, 19 Hastings L. J. 865 (1968); A State Statute to Liberalize Criminal Discovery, 4 Harv. J. Legis. 105 (1967); Comment, Disclosure and Discovery in Criminal Cases: Where Are We

In light of this disparity, one important service the preliminary hearing performs is to permit counsel to penetrate the evidence offered by the prosecution at the hearing, to test its strengths and weaknesses (without the presence of a jury), to learn the names and addresses of witnesses, to focus upon the key factual issues in the upcoming trial, and to preserve testimony for impeachment purposes. The alternative discovery techniques suggested now by the plurality are puny in comparison. A bill of particulars can usually reach only prosecution witnesses' names, and it may be cold comfort to defense counsel to learn that he can obtain pretrial statements of prosecution witnesses inasmuch as such statements are often prepared from the State's viewpoint and have not been subjected to cross-examination. And in many States such statements are not discoverable.

Finally, when read in light of *Coleman*'s exaltation of the virtues of counseled preliminary hearings, the present language of the plurality may lend itself to a "credibility gap" between it and those involved in the administration of the criminal process. "Plainly," said the *Coleman* Court, "the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution," *Coleman* v. *Alabama, supra,* at 9, and: "The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a 'critical stage' of the State's criminal process at which the accused is 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" *Id.,* at 9–10. It will

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Headed?, 6 Duquesne U. L. Rev. 41 (1967); Bibliography: Criminal Discovery, 5 Tulsa L. J. 207 (1968); Symposium: Discovery in Federal Criminal Cases, 33 F. R. D. 53 (1963); Brennan, Criminal Prosecution: Sporting Event or Quest For Truth?, 1963 Wash. U. L. Q. 279.

now appear somewhat anomalous that the right to counsel at a preliminary hearing is fundamental enough to be incorporated into the Fourteenth Amendment but not fundamental enough to warrant application to the victims of previous unconstitutional conduct.[7]

II

I also believe that the plurality's case for establishing good-faith reliance on "the old standards" by state judicial systems ignores important developments in the right-to-counsel cases prior to *Coleman*. First of all, no decision of this Court had held that counsel need not be afforded at the preliminary hearing stage. Therefore, to build a case for good-faith reliance the State must wring from our decision the negative implication that uncounseled probable-cause hearings were permissible. Such negative implications are found, says the plurality, in *Hamilton* v. *Alabama*, 368 U. S. 52 (1961), and *White* v. *Maryland*, 373 U. S. 59 (1963), cases reversing convictions obtained through the use at trial of uncounseled guilty pleas entered at preliminary hearings. Neither of those decisions, however, faced the question of whether reversal

[7] I am aware that the retroactivity theory presently commanding a Court permits a distinction between rules designed to fortify the reliability of verdicts and rules designed to protect other values. But here, as the plurality suggests, three of the four functions counsel might serve at preliminary hearings would appear to enhance the factfinding process: discovery of the State's case, preserving of testimony of both hostile and favorable witnesses, and obtaining release on bail. Although the plurality appears to discount the investigative advantage of being free on bail, I believe that this "traditional right to freedom before conviction permits the unhampered preparation of a defense." *Stack* v. *Boyle*, 342 U. S. 1, 4 (1951). See also *Kinney* v. *Lenon*, 425 F. 2d 209, 210 (CA9 1970), where the Court of Appeals found that "the appellant is the only person who can effectively prepare his own defense," because the incarcerated accused was the only person who could recognize witnesses by sight who might have seen a scuffle.

was required on the facts of the instant case. And, though I have studied these two short opinions, I am unable, as is the plurality, to divine any hidden message to law enforcement agencies that we would permit the denial of counsel at preliminary hearings where guilty pleas were not taken. Rather, these cases reinforce, in my mind, the importance of counsel at every stage in the criminal process. In any event, by the time *Coleman* came down, it was clear, as Mr. Justice Harlan opined, albeit with some regret, that our holding was an inevitable consequence of prior case law:

> "If I felt free to consider this case upon a clean slate I would have voted to affirm these convictions. But—in light of the lengths to which the right to appointed counsel has been carried in recent decisions of this Court, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *United States* v. *Wade*, 388 U. S. 218 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967); *Mathis* v. *United States*, 391 U. S. 1 (1968); and *Orozco* v. *Texas*, 394 U. S. 324 (1969)—I consider that course is not open to me with due regard for the way in which the adjudicatory process of this Court, as I conceive it, should work. . . .
>
> . . . . . .
>
> "It would indeed be strange were this Court, having held a suspect or an accused entitled to counsel at such pretrial stages as 'in-custody' police investigation, whether at the station house (*Miranda*) or even in the home (*Orozco*), now to hold that he is left to fend for himself at the first formal confrontation in the courtroom." *Coleman* v. *Alabama*, *supra*, at 19–20 (separate opinion).[8]

[8] To this list might have been added *Roberts* v. *LaVallee*, 389 U. S. 40 (1967), holding that the State must provide an indigent with a preliminary hearing transcript in every circumstance in which the more affluent accused could obtain one.

Thus, in the instant case, at the times relevant, the State should have foreseen that the right to counsel attached to the probable-cause hearing.

III

I also disagree that "[t]he impact upon the administration of the criminal law of [*Coleman* retroactivity] needs no elaboration." *Ante*, at 284. In the 19 months since *Coleman* was decided all new prosecutions have presumably followed it and we therefore need only be concerned, for impact purposes, with those state proceedings in which a preliminary hearing was held prior to June 1970. Inasmuch as the median state sentence served by felons when they are first released is about 20.9 months,[9] most pre-*Coleman* sentences would now be served and as a practical matter these former prisoners would not seek judicial review. Moreover, we may exclude from our consideration those 16 or more States that prior to *Coleman* routinely appointed counsel at or prior to preliminary hearings. See American Bar Association, Project on Standards for Criminal Justice, Providing Defense Services § 5.1 (Approved Draft 1968). Additionally, we may exclude from consideration the possibility of collateral challenges by federal prisoners inasmuch as counsel have routinely been present at preliminary hearings before federal commissioners.[10] See Fed. Rule Crim. Proc. 5 (b).

While there are some current prisoners who might challenge their confinements if *Coleman* were held retro-

[9] Federal Bureau of Prisons, National Prisoner Statistics—Characteristics of State Prisoners, 1960, pp. 26–27 (1965).

[10] In this respect the instant case further differs from *Stovall* v. *Denno*, 388 U. S., at 299, where it was found that: "The law enforcement officials of the Federal Government and of all 50 States have heretofore proceeded on the premise that the Constitution did not require the presence of counsel at pretrial confrontations for identification."

spective, many of these attacks would probably fail under the harmless-error rule of *Chapman* v. *California*, 386 U. S. 18 (1967). The plurality opinion suggests that conducting such harmless-error proceedings would be onerous. One reason given is that in Illinois, for example, preliminary hearings were not recorded before *Coleman*. That assertion may not be entirely accurate in light of the fact that this very record contains a transcript of Adams' preliminary hearing. Perhaps, as the respondent seems to concede,[11] transcripts were made available in other Illinois cases. That is the more reasonable assumption in light of our holding in *Roberts* v. *LaVallee*, 389 U. S. 40 (1967), that the State must provide a preliminary hearing transcript to an indigent in every circumstance in which the more affluent accused could obtain one.

Even where a transcript was not available, however, a prisoner might be able to show at an evidentiary hearing that he was prejudiced by a particular need for discovery, by the inability to preserve the testimony of either an adverse or favorable witness, or by the inability to secure his release on bail in order to assist in the preparation of his defense.[12] Courts are accustomed, of course, to assessing claims of prejudice without the aid of transcripts of previous proceedings, such as is required by *Jackson* v. *Denno*, 378 U. S. 368 (1964), or *Townsend* v. *Sain*, 372 U. S. 293 (1963). Indeed, in *Coleman* we remanded for a determination of whether the failure to appoint counsel had been harmless error. 399 U. S., at 11. Not every *Coleman* claim would warrant an evidentiary hearing. Many attacks might be disposed of summarily, such as a challenge to a conviction resulting from a counseled guilty plea entered before any preju-

[11] Brief for Respondent 33.

[12] See n. 7, *supra*.

dice had materialized from an uncounseled preliminary hearing. See *Procunier* v. *Atchley*, 400 U. S. 446 (1971).

Even *Stovall* v. *Denno*, 388 U. S., at 299, the analogy frequently invoked by the plurality, held out the possibility of collateral relief in cases where prisoners could show that their lineups had imposed "such unfairness that [they] infringed [their] right to due process of law." Conducting *Coleman* harmless-error hearings would not appear to be any more burdensome on the administration of criminal justice than have *Stovall* "fundamental fairness" post-conviction proceedings.

In any event, whatever litigation might follow a holding of *Coleman* retrospectivity must be considered part of the price we pay for former failures to provide fair procedures.

UNITED STATES *v.* MISSISSIPPI CHEMICAL CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70–52. Argued January 10, 1972—Decided March 6, 1972

Respondent taxpayers are cooperative associations within the meaning of the Agricultural Marketing Act, and thus qualify for membership in one of the Banks for Cooperatives established by the Farm Credit Act of 1933, which provides that members may borrow money from their Banks. Respondents secured membership in the New Orleans Bank and elected to borrow. They were required by the Farm Credit Act of 1955 to make quarterly purchases of $100 par value Class C stock of the Bank equal to not less than 10% nor more than 25% of the amount of the quarterly interest paid to the Bank on their loans. During the relevant period the rate set by the Bank was 15%. Respondents claimed a $99 interest expense deduction on their tax returns for each $100 stock purchase required by the statute. The deductions were disallowed and respondents filed this suit for refunds. The Government contended that the stock is a capital asset as defined by 26 U. S. C. § 1221, and is nondeductible, while respondents asserted that the purchase price is part of "the amount [they] contracted to pay for the use of the borrowed money," and is deductible as interest. The District Court found for the respondents and the Court of Appeals affirmed. *Held:* It is clear from the legislative scheme that the Class C stock is a capital asset having a long-term value. Its cost is, therefore, not deductible as an interest expense. Pp. 302–312.

431 F. 2d 1320, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which all Members joined except BLACKMUN, J., who took no part in the consideration or decision of the case.

Matthew J. Zinn argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Walters, Thomas L. Stapleton,* and *Leonard J. Henzke, Jr.*

John C. Satterfield argued the cause for respondents. With him on the brief was *J. Dudley Buford.*

Mac Asbill, Jr., Harold S. Cook, D. Jeff Lance, and *William W. Beckett* filed a brief for Agway, Inc., et al. as *amici curiae* urging affirmance.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Mississippi Chemical Corp. and Coastal Chemical Corp. (hereinafter taxpayers) instituted this action for a tax refund in the United States District Court for the Southern District of Mississippi. Both taxpayers are "cooperative associations" within the meaning of § 15 of the Agricultural Marketing Act, 46 Stat. 18, as amended, 12 U. S. C. § 1141j, and thus qualify for membership in one of the 12 "Banks for Cooperatives" (hereinafter Bank(s)) established by the Farm Credit Act of 1933, 48 Stat. 257, as amended, 12 U. S. C. § 1134 *et seq.* Since their principal places of business are located in Mississippi, their regional Bank is the one located in New Orleans.

The Farm Credit Act of 1933 provides that members may borrow money from their Banks and, soon after securing membership in the New Orleans Bank, the taxpayers elected to borrow.[1] Thereafter, they were required by the Farm Credit Act of 1955, 69 Stat. 656, 12 U. S. C. § 1134d (a)(3), which partially amended the 1933 Act, to make quarterly purchases of $100 par value Class C stock of the Bank equal to not less than 10% nor more than 25% of the amount of the quarterly interest that they paid to the Bank on

[1] Mississippi Chemical Corp. acquired the share of stock qualifying it as a borrower in 1956; Coastal Chemical Corp. acquired its qualifying share in 1957.

their loans. During the period relevant to this lawsuit, the rate set by the Bank was 15%.[2]

On their tax returns for the years in question, the taxpayers claimed a $99 interest expense deduction for every $100 stock purchase required by the statute.[3] The Commissioner of Internal Revenue disallowed the deductions, the taxpayers paid the assessed deficiencies, and this action arose.

The United States has consistently contended that the stock that the taxpayers were required to purchase under the 1955 Act is a capital asset as defined by § 1221 of the Internal Revenue Code, 26 U. S. C. § 1221, and that its cost is nondeductible. See 26 U. S. C. § 263. The taxpayers have persistently urged that the money expended for this stock is part of "the amount [they] . . . contracted to pay for the use of borrowed money," *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560 (1932), and is deductible as interest. 26 U. S. C. § 163 (a).

The District Court found for the taxpayers[4] and the United States Court of Appeals for the Fifth Circuit affirmed over the dissent of Judge Godbold. 431 F. 2d 1320 (1970). We granted certiorari on February 22, 1971, to review the decision of the Court of Appeals. 401 U. S. 908. We reverse for the reasons stated below.

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[2] Mississippi Chemical Corp. challenges the Government's tax treatment of $55,113.19 spent from 1961 to 1963; Coastal Chemical Corp. challenges the treatment of $211,799.68 expended from 1958 to 1963.

[3] One dollar was treated as the cost of acquiring a capital asset.

[4] This decision is unreported but is found in App. 342–346. Other lower courts have split on the issue presented. Compare, *e. g.*, *M. F. A. Central Cooperative* v. *Bookwalter*, 427 F. 2d 1341 (CA8 1970), rev'g 286 F. Supp. 956 (ED Mo. 1968), pet. for cert. pending (No. 70–22), with *Penn Yan Agway Cooperative, Inc.* v. *United States*, 189 Ct. Cl. 434, 417 F. 2d 1372 (1969).

I

Early in this century, Congress recognized that farmers had a tremendous need for long-term capital at low interest rates. This led to the enactment of the Federal Farm Loan Act of 1916, 39 Stat. 360, as amended, 12 U. S. C. § 641 *et seq.* The immediate purpose of the bill was "to afford those who [were] engaged in farming or who desire[d] to engage in that occupation a vastly greater volume of land credit on more favorable terms and at materially lower and more nearly uniform interest rates than [were] present[ly] available." H. R. Rep. No. 630, 64th Cong., 1st Sess., 2. The long-range purpose was to stimulate and foster a cooperative spirit among farmers who, it was hoped, would work together to seek agricultural improvements which they would finance themselves. *Id.*, at 2–3; S. Rep. No. 144, 64th Cong., 1st Sess., 5.

The 1916 Act divided the United States into 12 regional districts under the general supervision of a Federal Farm Loan Board. Each district contained a federal land bank designed to loan money to farmers at low interest rates. Persons desiring to borrow were required to organize into groups of 10 or more which were called "national farm loan associations." Sec. 7, 39 Stat. 365.

In order to borrow from the district bank, an association had to establish that each of its members was an owner or a prospective owner of a farm, that the loan desired by each member was not less than $100 nor more than $10,000, and that the aggregate of the loans was not less than $20,000. Each association also had to subscribe for capital stock of the bank in the amount of 5% of the total loan sought by its members. The

association, in turn, was required to compel each of its members to purchase stock in the association equal to 5% of the amount of the loan sought by that member. Hence, there were two separate levels of cooperative association.[5]

The legislative history and the language of the Act itself indicate that Congress faced somewhat of a dilemma in structuring the land bank system. On the one hand, there was a strong congressional desire to stimulate a privately controlled, privately owned, and privately financed program based upon the cooperative efforts of dedicated farmers. This desire was effectuated in large measure in the stock-purchase requirements discussed above. On the other hand, Congress realized that without federal help, the existing plight of the farmers would probably render them unable to support the system themselves, and it would thus be doomed to failure:

> "The greatest difficulty in the establishment of a rural-credit system, based upon the cooperative principle, is met in connection with the inauguration of the system. Ample capital is absolutely necessary at the start and whatever sums the first borrowers might be able to contribute would in no wise suffice to get the system into successful operation. The system must be endowed, temporarily at least, with capital from sources other than the subscriptions to capital stock among the borrowers." H. R. Rep. No. 630, 64th Cong., 1st Sess., 9.

Accord, S. Rep. No. 144, 64th Cong., 1st Sess., 4.

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[5] The statute also provided that "joint stock land banks" could be formed. These were corporations, composed of 10 or more persons, who desired to form banks to loan money to farmers without the aid of congressional financing. They were subject to the same restrictions and conditions imposed on the district land banks.

To resolve the dilemma, Congress provided for temporary public financing without charge to supplement the stock-purchase requirements of the statute. Congress also provided that each land bank must periodically increase its capital shares in order to achieve the goal of private ownership of the system, and to repay the temporary federal financing.

The land bank system remained virtually untouched [6] until the economic depression of the 1930's when Congress determined that more action was needed to aid farmers in establishing privately owned institutions designed to provide ready sources of long-term credit. The Farm Credit Act of 1933 was passed to supplement the 1916 legislation. It established, *inter alia*, regional Banks for Cooperatives in each of the 12 land bank districts and a Central Bank for Cooperatives in Washington, D. C.[7]

These Banks were authorized to make loans to "cooperative associations," defined as "association[s] in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also . . . association[s] in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services." Agricultural Marketing Act § 15, 46 Stat. 18, as amended, 12 U. S. C. § 1141j.

The new Banks paralleled in many ways those already established under the 1916 legislation. The same re-

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[6] While Congress did not disturb the land bank system, it added to it at various times. For example, Title II of the Agricultural Credits Act of 1923, 42 Stat. 1461, 12 U. S. C. § 1151 *et seq.* (1958 ed.), was designed to aid farmers in obtaining short-term credit.

[7] The Act also established a production credit system to improve short-term financing for farmers. That system has no bearing on this case.

gional districts were used, many of the same persons were eligible for loans from both institutions, and borrowers from both banks were required to be stockholders. The 1933 Act required cooperative associations to own, at the time a loan was made, an amount of stock in the Bank for Cooperatives equal in fair book value (not to exceed par value) to $100 per $2,000 of the amount of the loan, or 5%, the same amount of stock required of borrowers from land banks under the 1916 Act.

One notable difference between the 1916 and the 1933 Acts was that the latter did not regulate the membership of the cooperative association to any great degree. For example, members of cooperative associations did not have to own stock in the associations, only in the Banks; they did not have to borrow a minimum amount; and they did not have to be farm owners or prospective farm owners, but could be processors, handlers, testers, or marketers. This is in sharp contrast to the stringent requirements of the 1916 legislation. Another notable difference is that Congress invested substantially more money in the 1933 program ($110,000,000) than it had invested in the land banks ($9,000,000). See S. Rep. No. 1201, 84th Cong., 1st Sess., 5, 7.

As time passed, Congress watched the land bank system develop as planned. The temporary Government capitalization that had solidified the program in its inception was gradually replaced by private capital, and by the end of 1947, the Government's capital had been completely returned. S. Doc. No. 7, 84th Cong., 1st Sess., 4; S. Rep. No. 1201, 84th Cong., 1st Sess., 7. The land banks became totally private concerns—owned, operated, and financed by farmers without Government assistance.

Congress also watched the development of the Banks for Cooperatives and became concerned about their lack

of success in attracting and keeping private investment. By the 1950's, the Government still retained over 88% of the stock in the Banks. In § 2 of the Farm Credit Act of 1953, 67 Stat. 390, 12 U. S. C. § 636a, Congress stated that "[i]t is declared to be the policy of the Congress to encourage and facilitate increased borrower participation in the management, control, and ultimate ownership of the permanent system of agricultural credit made available through institutions operating under the supervision of the Farm Credit Administration . . . ." A Federal Farm Credit Board was created for the purpose, *inter alia,* of making recommendations concerning the best way to convert the Banks for Cooperatives from predominantly Government-owned to predominantly privately owned institutions.

The result of the Board's report and recommendations was the Farm Credit Act of 1955, 69 Stat. 655. It sought to effectuate Congress' policy by providing for the orderly withdrawal of Government capital from the Banks and the continual influx and retention of substitute private financing. See S. Doc. No. 7, 84th Cong., 1st Sess., 6; S. Rep. No. 1201, 84th Cong., 1st Sess., 1; Hearings on Farm Credit Act of 1955 before the House Committee on Agriculture, 84th Cong., 1st Sess., 30–31.

II

Under the Farm Credit Act of 1933, there was only one class of capital stock in the Banks for Cooperatives. The Farm Credit Act of 1955 provided for three distinct classes of stock—A, B, and C.

Class A stock may only be held by the Governor of the Farm Credit Association on behalf of the United States. Whatever stock the Government held in the Banks prior to the 1955 Act was converted to Class A stock. This stock is nonvoting and receives no divi-

dends. Class A stock must be retired each year in an amount equal to the amount of Class C stock issued during the year. 12 U. S. C. § 1134d (a)(1). Once the United States' stock is completely redeemed, the Government will invest no more in the Banks, except that it may purchase additional shares of the Class A stock if an emergency makes it necessary in order for the bank to meet the credit needs of eligible borrowers.[8] See 12 U. S. C. §§ 1134d (a)(1), 1134b, 1134i.

Class B stock represents a new approach to capitalizing the Banks. It is an investment stock available to the public. It pays noncumulative dividends upon certain conditions. Class B stock may be retired only after all Class A stock. 12 U. S. C. § 1134d (a)(2).[9]

Class C stock may be issued only to farmers' cooperative associations, except that each regional bank is required to purchase such shares from the Central Bank. This stock may be obtained under four circumstances. One share is required to initially qualify any association as a borrower of a regional Bank. Each borrower must then make the quarterly stock purchases which gave rise to this lawsuit. In addition, 12 U. S. C. § 1134*l* (b) provides that after certain expenditures are made each year, patronage refunds may be allocated to borrowers in the form of Class C stock. "All patronage refunds shall be paid in the proportion that the amount of interest earned on the loans of each

[8] There is evidence in the record that the Government capital is being revolved out of the Banks just as Congress anticipated. See Farm Credit Administration, Banks for Cooperatives—A Quarter of a Century of Progress, excerpted in App. 157, 175. See also 431 F. 2d 1320, 1332, and n. 17 (Godbold, J., dissenting); Brief for the United States 7.

[9] The Class B shares are of only nominal importance. In 1963, they amounted to only some 5% of the total outstanding stock of the New Orleans Bank.

borrower bears to the total interest earned on the loans of all borrowers during the fiscal year." *Ibid.*[10] Borrowers also receive at the end of each fiscal year an "allocated surplus" credit which is payable out of the Bank's net savings. Like patronage refunds, allocated surplus is credited to each member in accordance with the proportion that the interest on its loans bears to the interest on all loans. When the surplus account reaches 25% of the total outstanding capital stock of the Bank, the excess may be distributed to members in the form of Class C stock.

Only the tax treatment of the quarterly purchases is disputed here.[11] The taxpayers correctly note that the Class C stock has attributes which would make a normal commercial stock undesirable. For example, the C stock pays no dividends;[12] it is transferable

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[10] The patronage refunds and the allocated surplus, discussed *infra*, are not a return on the amount of capital that the borrower contributes to the Bank; they are distributions of earnings, not presently convertible to cash, but are eventually convertible just as the quarterly Class C purchases may eventually be redeemed.

[11] The Government contended in the District Court that the taxpayers should have reported the patronage dividends as income. The District Court disagreed and the Government did not appeal this point. It is not, therefore, reviewable here, and the Government does not urge that we consider it.

[12] While no formal dividends are paid on the C stock, it is apparent that the patronage dividend is in many ways equivalent to the traditional corporate dividend. As noted above, the patronage dividend is not immediately convertible to cash, but it is far from worthless. Like the usual corporate dividends, the patronage dividends are paid in proportion to stock ownership. Stock ownership is apportioned according to the amount a Bank member borrows. Thus, those who borrow the most own the most stock and receive the most patronage dividends (and surplus as well). As the Class A stock and the earlier issued Class B and Class C stock are redeemed, the C stock issued as dividends will become convertible to cash and its value will be realized at that time.

In the event of a default by a borrower, the Class C stock is

only between cooperatives and only under rare circumstances; additional shares do not provide additional voting power; [13] and the stock cannot be redeemed until all A, all B issued earlier or in the same year, and all earlier issued C shares have been called for redemption. These characteristics render the market for C shares virtually nonexistent.

It must be remembered, however, that the stock was intentionally given these characteristics by a Congress with definite goals in mind.[14] The legislative history of the Farm Credit Act of 1955 indicates that Congress placed much of the blame for the Bank's inability to

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set off against the amount of the loan. Hence, the more patronage dividends the member receives, the more security he has in case of default.

[13] Cooperative associations are entitled to vote in polls designating nominees for appointment to the Federal Farm Credit Board, established by the Farm Credit Act of 1953, 67 Stat. 390, as amended, 12 U. S. C. § 636c, to help effectuate congressional policy; to vote in the nomination polls and elections of members of district farm credit boards established by the Farm Credit Act of 1937, 50 Stat. 703, 12 U. S. C. § 640a; and to vote in the nomination and elections of directors of the Central Bank for Cooperatives. It is normal for every member of a cooperative to have only one vote, irrespective of a disparity between the shares held. See *Frost* v. *Corporation Comm'n*, 278 U. S. 515, 536–537 (1929) (Brandeis, J., dissenting); I. Packel, The Law of Cooperatives §§ 23–24 (a), pp. 136–140 (3d ed. 1956). It is interesting that the Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. §§ 291–292, permits a cooperative marketing association immunity from the Sherman Act under some circumstances, but *only* if no member is entitled to more than one vote.

[14] Cooperatives and corporations operate on different principles. Whereas the corporate structure separates control and management, the essence of a cooperative requires that these functions be integrated. And, whereas the value of corporate stock depends on ease of transferability (or marketability), the value of cooperative stock lies in the durable, long-term nature of the investment. See Nieman, Revolving Capital in Stock Cooperative Corporations, 13 Law & Contemp. Prob. 393 (1948).

repay the capital extended by the Government and to retain private capital on the provision in the 1933 legislation which permitted borrowers to redeem their stock for cash upon paying off their loans. The restrictions on redemption and transferability and the dividend prohibition were designed to obviate this difficulty and to provide both a stable membership and permanent capital, two necessities for the success of any cooperative venture.

III

The taxpayers do not seek to deduct the cost of their initial shares in the Bank as interest. They accept the fact that these shares represent one cost of membership and that this cost is a capital expense because membership is a valuable asset in more than one taxable year. But, they argue that once they purchased their initial shares, they obtained full membership rights, and, *a fortiori*, that Congress must have intended the quarterly expenditures for stock to be a charge for borrowing money since the stock has no value. The fact is, however, that the stock purchased quarterly is indeed valuable. The amounts paid for C shares become part of the permanent capital structure of the Bank, thereby increasing the stability of the Bank and insuring its continued ability to extend credit. Each share also provides an opportunity for more patronage and surplus dividends, an ultimate right of redemption, and an asset that may be used as a set-off in case of a default on the loan. In sum, every share of stock purchased quarterly by the taxpayers is nearly as valuable as the shares purchased initially. It is therefore difficult to understand why these different purchases should receive radically different tax treatment. If Congress had required 1,000 or 100,000 shares of Class C stock to be pur-

chased before an association could borrow from the Banks, under the taxpayers' theory of the case the cost of those shares would be a nondeductible capital expense. Simply because Congress eased the burden on farmers by spreading the requirement of capital investment over a period of time rather than requiring it as a prerequisite to borrowing, the taxpayers are entitled to no more favorable tax treatment.

It is important not to lose sight of the congressional purposes in enacting the farm credit legislation. The immediate goal was to provide loans to farmers at low interest rates. It would, therefore, be odd for Congress to provide a "hidden" interest charge in the legislation. The long-range goal was to make the Banks "fully cooperative and to place full ownership and responsibility for their operations and success in the hands of those eligible to borrow from them." Hearings on Farm Credit Act of 1955 before a Subcommittee of the Senate Committee on Agriculture and Forestry, 84th Cong., 1st Sess., 60. Congress felt, in light of its experience under the Farm Credit Act of 1933, that the long-range goal could only be achieved if Bank members made long-term investments in the Banks. Hence, Congress created Class C stock, a security with a special value in cooperative ventures. While this security is *sui generis*, the congressional scheme makes it clear that it has value over the long run.

Since the security is of value in more than one taxable year, it is a capital asset within the meaning of § 1221 of the Internal Revenue Code, and its cost is nondeductible. Cf. *Commissioner* v. *Lincoln Savings & Loan Assn.*, 403 U. S. 345 (1971); *Old Colony R. Co.* v. *United States*, 284 U. S. 552 (1932); 26 CFR § 1.461–1.

We reject the contention that while the Class C

stock may be a capital asset, it is worth only $1,[15] and that the additional $99 paid for each share must represent interest. Were we dealing with the traditional corporate structure in this case, the taxpayers' argument would have strength. But, as we have pointed out previously, the essential nature of cooperatives and corporations differs. The value of the Class C stock derives primarily from attributes other than marketability. The stock has value because it is the foundation of the cooperative scheme; it insures stability and continuity. The stock also has value because it enables the farmers to work together toward common goals. It enables them to share in a venture of common concerns and to reap the rewards of knowing that they can finance themselves without the assistance of the Federal Government. It is perhaps debatable whether these attributes should properly be valued at $100 per share, but we are not called upon merely to resolve a question of valuation. Rather, we must decide whether it is artificial to characterize these unique expenditures as payments for a capital asset. We find that it is not.

The taxpayers and the Government each allege that the other is looking at form rather than substance. At some point, however, the form in which a transaction is cast must have considerable impact. Guterman, Substance v. Form in the Taxation of Personal and Business Transactions, N. Y. U. 20th Inst. on Fed. Tax. 951 (1962).

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[15] It is by no means clear that the Class C stock is worth only $1 even under a traditional market value analysis. The lower courts failed to include the value of the patronage and surplus dividends in computing the value of the quarterly purchases. The Class C stock may, therefore, be worth considerably more than $1, although the Government concedes that it is not worth $100. Because of the result we reach in this case, we have no occasion to make a final determination as to what value the stock would have under a market-value analysis.

Congress chose to make the taxpayers buy stock; Congress determined that the stock was worth $100 a share; and this stock was endowed with a long-term value. While Congress might have been able to achieve the same ends through additional interest payments, it chose the form of stock purchases. This form assures long-term commitment and has bearing on the tax consequences of the purchases.

Accordingly, the decision of the Court of Appeals is reversed and the case is remanded with direction that judgment be entered for the United States.

It is so ordered.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

RABE *v.* WASHINGTON

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 71-247. Argued February 29, 1972—Decided March 20, 1972

Petitioner was convicted of violating Washington's obscenity statute for showing a sexually frank motion picture at a drive-in theater. In affirming his conviction, the Washington Supreme Court did not hold that the film was obscene under the standards of *Roth* v. *United States*, 354 U. S. 476, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, but that it was obscene in "the *context* of its exhibition" at a drive-in. The statute proscribing the knowing display of "obscene" films did not mention the location of the exhibition as an element of the offense. *Held:* A State may not criminally punish the exhibition of a motion picture film at a drive-in theater where the statute assertedly violated has not given fair notice that the location of the exhibition was a vital element of the offense.

79 Wash. 2d 254, 484 P. 2d 917, reversed.

William L. Dwyer argued the cause and filed briefs for petitioner.

Curtis Ludwig argued the cause for respondent. With him on the brief was *Herbert H. Davis.*

Briefs of *amici curiae* urging reversal were filed by *Stanley Fleishman* and *Sam Rosenwein* for the National Association of Theatre Owners, Inc., and by *Louis Nizer* and *James Bouras* for the Motion Picture Association of America, Inc.

Constantine Regusis filed a brief for Morality in Media, Inc., as *amicus curiae,* urging affirmance.

PER CURIAM.

Petitioner was the manager of the Park Y Drive-In Theatre in Richland, Washington, where the motion picture Carmen Baby was shown. The motion picture is a loose adaptation of Bizet's opera Carmen, con-

taining sexually frank scenes but no instances of sexual consummation are explicitly portrayed. After viewing the film from outside the theater fence on two successive evenings, a police officer obtained a warrant and arrested petitioner for violating Washington's obscenity statute. Wash. Rev. Code § 9.68.010. Petitioner was later convicted and, on appeal, the Supreme Court of Washington affirmed. 79 Wash. 2d 254, 484 P. 2d 917 (1971). We granted certiorari. 404 U. S. 909. We reverse petitioner's conviction.

The statute under which petitioner was convicted, Wash. Rev. Code § 9.68.010, made criminal the knowing display of "obscene" motion pictures:

> "Every person who—
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> "(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or
>
> "(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;
>
> "Shall be guilty of a gross misdemeanor."

In affirming petitioner's conviction, however, the Supreme Court of Washington did not hold that Carmen Baby was obscene under the test laid down by this Court's prior decisions. *E. g., Roth* v. *United States,* 354 U. S. 476; *Memoirs* v. *Massachusetts,* 383 U. S. 413. Uncertain "whether the movie was offensive to the standards relating to sexual matters in that area and whether

the movie advocated ideas or was of artistic or literary value," the court concluded that if it "were to apply the strict rules of *Roth*, the film 'Carmen Baby' probably would pass the definitional obscenity test if the viewing audience consisted only of consenting adults." 79 Wash. 2d, at 263, 484 P. 2d, at 922. Respondent read the opinion of the Supreme Court of Washington more narrowly, but nonetheless implied that because the film had "redeeming social value" it was not, by itself, "obscene" under the *Roth* standard. The Supreme Court of Washington nonetheless upheld the conviction, reasoning that in "the *context* of its exhibition," Carmen Baby was obscene. *Ibid.*

To avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed. The statute under which petitioner was prosecuted, however, made no mention that the "context" or location of the exhibition was an element of the offense somehow modifying the word "obscene." Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating.

"It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole* v. *Arkansas*, 333 U. S. 196, 201. Petitioner's conviction cannot, therefore, be allowed to stand. *Gregory* v. *City of Chicago*, 394 U. S. 111; *Garner* v. *Louisiana*, 368 U. S. 157; *Cole* v. *Arkansas*, *supra*.

Under the interpretation given § 9.68.010 by the Supreme Court of Washington, petitioner is criminally punished for showing Carmen Baby in a drive-in but he may exhibit it to adults in an indoor theater with impunity. The statute, so construed, is impermissibly vague as applied to petitioner because of its failure to

give him fair notice that criminal liability is dependent upon the place where the film is shown.

What we said last Term in *Cohen* v. *California*, 403 U. S. 15, 19, answers respondent's contention that the peculiar interest in prohibiting outdoor displays of sexually frank motion pictures justifies the application of this statute to petitioner:

> "Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. . . . No fair reading of the phrase 'offensive conduct' can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created."

We need not decide the broad constitutional questions tendered to us by the parties. We hold simply that a State may not criminally punish the exhibition at a drive-in theater of a motion picture where the statute, used to support the conviction, has not given fair notice that the location of the exhibition was a vital element of the offense.

The judgment of the Supreme Court of Washington is

Reversed.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, concurring.

I concur solely on the ground that petitioner's conviction under Washington's general obscenity statute cannot, under the circumstances of this case, be sustained consistent with the fundamental notice requirements of

the Due Process Clause. The evidence in this case, however, revealed that the screen of petitioner's theater was clearly visible to motorists passing on a nearby public highway and to 12 to 15 nearby family residences. In addition, young teenage children were observed viewing the film from outside the chain link fence enclosing the theater grounds. I, for one, would be unwilling to hold that the First Amendment prevents a State from prohibiting such a public display of scenes depicting explicit sexual activities if the State undertook to do so under a statute narrowly drawn to protect the public from potential exposure to such offensive materials. See *Redrup* v. *New York*, 386 U. S. 767 (1967).[1]

Public displays of explicit materials such as are described in this record are not significantly different from any noxious public nuisance traditionally within the power of the States to regulate and prohibit, and, in my view, involve no significant countervailing First Amendment considerations.[2] That this record shows an offensive nuisance that could properly be prohibited, I have no doubt, but the state statute and charge did not give the notice constitutionally required.

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[1] For examples of recent statutes regulating public displays, see Ariz. Rev. Stat. Ann. § 13–537 (Supp. 1971–1972); N. Y. Penal Law §§ 245.10–245.11 (Supp. 1971–1972).

[2] Under such circumstances, where the very method of display may thrust isolated scenes on the public, the *Roth* v. *United States*, 354 U. S. 476, 489 (1957), requirement that the materials be "taken as a whole" has little relevance. For me, the First Amendment must be treated in this context as it would in a libel action: if there is some libel in a book, article, or speech we do not average the tone and tenor of the whole; the libelous part is not protected.

WILLIS *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 70-5344. Argued February 28, 1972—Decided March 20, 1972

227 Ga. 619, 182 S. E. 2d 420, affirmed by an equally divided Court.

E. Freeman Leverett argued the cause and filed a brief for petitioner.

A. Felton Jenkins, Jr., argued the cause for respondent. With him on the brief was *Woodrow W. Lavender*.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

CRUZ *v.* BETO, CORRECTIONS DIRECTOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71–5552. Decided March 20, 1972

Petitioner prisoner, an alleged Buddhist, complained that he was not allowed to use the prison chapel, that he was prohibited from writing to his religious advisor, and that he was placed in solitary confinement for sharing his religious material with other prisoners. The Federal District Court denied relief without a hearing or findings, holding the complaint to be in an area that should be left "to the sound discretion of prison administration." The Court of Appeals affirmed. *Held:* On the basis of the allegations, Texas has discriminated against petitioner by denying him a reasonable opportunity to pursue his Buddhist faith comparable to that offered other prisoners adhering to conventional religious precepts, and the cause is remanded for a hearing and appropriate findings.

Certiorari granted; 445 F. 2d 801, vacated and remanded.

PER CURIAM.

The complaint, alleging a cause of action under 42 U. S. C. § 1983, states that Cruz is a Buddhist, who is in a Texas prison. While prisoners who are members of other religious sects are allowed to use the prison chapel, Cruz is not. He shared his Buddhist religious material with other prisoners and, according to the allegations, in retaliation was placed in solitary confinement on a diet of bread and water for two weeks, without access to newspapers, magazines, or other sources of news. He also alleged that he was prohibited from corresponding with his religious advisor in the Buddhist sect. Those in the isolation unit spend 22 hours a day in total idleness.

Again, according to the allegations, Texas encourages inmates to participate in other religious programs, providing at state expense chaplains of the Catholic, Jewish, and Protestant faiths; providing also at state expense copies of the Jewish and Christian Bibles, and conducting

weekly Sunday school classes and religious services. According to the allegations, points of good merit are given prisoners as a reward for attending orthodox religious services, those points enhancing a prisoner's eligibility for desirable job assignments and early parole consideration.[1] Respondent answered, denying the allegations and moving to dismiss.

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[1] The amended complaint alleges, *inter alia:*

"Plaintiff is an inmate of the Texas Department of Corrections and is a member of the Buddhist Churches of America. At the time of filing of this suit, he was incarcerated at the Eastham Unit and has since been transferred to the Ellis Unit. There is a substantial number of prisoners in the Texas Department of Corrections who either are adherents of the Buddhist Faith or who wish to explore the gospel of Buddhism; however, the Defendants have refused in the past, and continue to refuse, Buddhists the right to hold religious services or to disseminate the teachings of Buddha. The Plaintiff has been prevented by the Defendants from borrowing or lending Buddhist religious books and materials and has been punished by said Defendants by being placed in solitary confinement on a diet of bread and water for two weeks for sharing his Buddhist religious material with other prisoners.

"Despite repeated requests to Defendants for the use of prison chapel facilities for the purpose of holding Buddhist religious services and the denials thereof the Defendants have promulgated customs and regulations which maintain a religious program within the penal system under which:

"A. Consecrated chaplains of the Protestant, Jewish and Roman Catholic religions at state expense are assigned to various units.

"B. Copies of the Holy Bible (Jewish and Christian) are distributed at state expense free to all prisoners.

"C. Religious services and religious classes for Protestant, Jewish and Roman Catholic adherents are held regularly in chapel facilities erected at state expense for 'non-denominational' purposes.

"D. Records are maintained by Defendants of religious participation by inmates.

"E. Religious participation is encouraged on inmates by the Defendants as necessary steps toward true rehabilitation.

"F. Points of good merit are given to inmates by the Defendants as a reward for religious participation in Protestant, Jewish and

The Federal District Court denied relief without a hearing or any findings, saying the complaint was in an area that should be left "to the sound discretion of prison administration." It went on to say, "Valid disciplinary and security reasons not known to this court may prevent the 'equality' of exercise of religious practices in prison." The Court of Appeals affirmed. 445 F. 2d 801.

Federal courts sit not to supervise prisons but to enforce the constitutional rights of all "persons," including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes "access of prisoners to the courts for the purpose of presenting their complaints." *Johnson* v. *Avery,* 393 U. S. 483, 485; *Ex parte Hull,* 312 U. S. 546, 549. See also *Younger* v. *Gilmore,* 404 U. S. 15, aff'g *Gilmore* v. *Lynch,* 319 F. Supp. 105 (ND Cal.). Moreover, racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for "the necessities of prison security and discipline." *Lee* v. *Washington,* 390 U. S. 333, 334. Even more closely in point is *Cooper* v. *Pate,* 378 U. S. 546, where we reversed a

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Roman Catholic faiths which enhance on inmates eligibility for promotions in class, job assignment and parole.

"Because inmates of the Buddhist faith are being denied the right to participate in the religious program made available for Protestant, Jewish and Roman Catholic faiths by the Defendants, Plaintiff and the members of the class he represents are being subjected to an arbitrary and unreasonable exclusion without any lawful justification which invidiously discriminates against them in violation of their constitutional right of religious freedom and denies them equal protection of the laws."

dismissal of a complaint brought under 42 U. S. C. § 1983. We said: "Taking as true the allegations of the complaint, as they must be on a motion to dismiss, the complaint stated a cause of action." *Ibid.* The allegation made by that petitioner was that solely because of his religious beliefs he was denied permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners.

We said in *Conley* v. *Gibson*, 355 U. S. 41, 45–46, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion, established 600 B. C., long before the Christian era.[2] The First Amendment, applicable to the States by reason of the Fourteenth Amendment, *Torcaso* v. *Watkins*, 367 U. S. 488, 492–493, prohibits government from making a law "prohibiting the free exercise" of religion. If the allegations of this complaint are assumed to be true, as they must be on the motion to dismiss, Texas has violated the First and Fourteenth Amendments.

The motion for leave to proceed *in forma pauperis*

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[2] We do not suggest, of course, that every religious sect or group within a prison—however few in number—must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand. But reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty.

is granted. The petition for certiorari is granted, the judgment is vacated, and the cause remanded for a hearing and appropriate findings.

So ordered.

MR. JUSTICE BLACKMUN concurs in the result.

MR. CHIEF JUSTICE BURGER, concurring in the result.

I concur in the result reached even though the allegations of the complaint are on the borderline necessary to compel an evidentiary hearing. Some of the claims alleged are frivolous; others do not present justiciable issues. There cannot possibly be any constitutional or legal requirement that the government provide materials for every religion and sect practiced in this diverse country. At most, Buddhist materials cannot be denied to prisoners if someone offers to supply them.

MR. JUSTICE REHNQUIST, dissenting.

Unlike the Court, I am not persuaded that petitioner's complaint states a claim under the First Amendment, or that if the opinion of the Court of Appeals is vacated the trial court must necessarily conduct a trial upon the complaint.[1]

Under the First Amendment, of course, Texas may neither "establish a religion" nor may it "impair the free exercise" thereof. Petitioner alleges that voluntary services are made available at prison facilities so that Protestants, Catholics, and Jews may attend church services of their choice. None of our prior holdings

[1] The Court "remand[s] for a hearing and appropriate findings," *ante*, this page. But, of course, the only procedural vehicle for making such findings in this civil litigation would be the trial to which any civil litigant is entitled, inasmuch as this Court has never dealt with the special procedural problems presented by prisoners' civil suits. See Fed. Rules Civ. Proc.

indicates that such a program on the part of prison officials amounts to the establishment of a religion.

Petitioner is a prisoner serving 15 years for robbery in a Texas penitentiary. He is understandably not as free to practice his religion as if he were outside the prison walls. But there is no intimation in his pleadings that he is being punished for his religious views, as was the case in *Cooper* v. *Pate,* 378 U. S. 546 (1964), where a prisoner was denied the receipt of mail about his religion. *Cooper* presented no question of interference with prison administration of the type that would be involved here in retaining chaplains, scheduling the use of prison facilities, and timing the activities of various prisoners.

None of our holdings under the First Amendment requires that, in addition to being allowed freedom of religious belief, prisoners be allowed freely to evangelize their views among other prisoners. There is no indication in petitioner's complaint that the prison officials have dealt more strictly with his efforts to convert other convicts to Buddhism than with efforts of communicants of other faiths to make similar conversions.

By reason of his status, petitioner is obviously limited in the extent to which he may *practice* his religion. He is assuredly not free to attend the church of his choice outside the prison walls. But the fact that the Texas prison system offers no Buddhist services at this particular prison does not, under the circumstances pleaded in his complaint, demonstrate that his religious freedom is being impaired. Presumably prison officials are not obligated to provide facilities for any particular denominational services within a prison, although once they undertake to provide them for some they must make only such reasonable distinctions as may survive analysis under the Equal Protection Clause.

What petitioner's basic claim amounts to is that because prison facilities are provided for denominational services for religions with more numerous followers, the failure to provide prison facilities for Buddhist services amounts to a denial of the equal protection of the laws. There is no indication from petitioner's complaint how many practicing Buddhists there are in the particular prison facility in which he is incarcerated, nor is there any indication of the demand upon available facilities for other prisoner activities. Neither the decisions of this Court after full argument, nor those summarily reversing the dismissal of a prisoner's civil rights complaint [2] have ever given full consideration to the proper balance to be struck between prisoners' rights and the extensive administrative discretion that must rest with correction officials. I would apply the rule of deference to administrative discretion that has been overwhelmingly accepted in the courts of appeals.[3] Failing that, I would at least hear argument as to what rule should govern.

A long line of decisions by this Court has recognized that the "equal protection of the laws" guaranteed by the Fourteenth Amendment is not to be applied in a precisely equivalent way in the multitudinous fact situa-

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[2] *Haines* v. *Kerner*, 404 U. S. 519 (1972); *Younger* v. *Gilmore*, 404 U. S. 15 (1971); *Houghton* v. *Shafer*, 392 U. S. 639 (1968); *Lee* v. *Washington*, 390 U. S. 333 (1968); *Cooper* v. *Pate*, 378 U. S. 546 (1964).

[3] *Douglas* v. *Sigler*, 386 F. 2d 684, 688 (CA8 1967); *Carey* v. *Settle*, 351 F. 2d 483 (CA8 1965); *Carswell* v. *Wainwright*, 413 F. 2d 1044 (CA5 1969); *Walker* v. *Pate*, 356 F. 2d 502 (CA7 1966). I do not read *Johnson* v. *Avery*, 393 U. S. 483 (1969), which was concerned with the prisoners' traditional remedy of habeas corpus, to reach the issue of a statutory civil cause of action such as 42 U. S. C. § 1983.

tions that may confront the courts.[4] On the one hand, we have held that racial classifications are "invidious" and "suspect." [5] I think it quite consistent with the intent of the framers of the Fourteenth Amendment, many of whom would doubtless be surprised to know that convicts came within its ambit, to treat prisoner claims at the other end of the spectrum from claims of racial discrimination. Absent a complaint alleging facts showing that the difference in treatment between petitioner and his fellow Buddhists and practitioners of denominations with more numerous adherents could not reasonably be justified under any rational hypothesis, I would leave the matter in the hands of the prison officials.[6]

It has been assumed that the dismissal by the trial court must be treated as proper only if the standard of *Conley* v. *Gibson*, 355 U. S. 41 (1957), would permit the grant of a motion under Fed. Rule Civ. Proc. 12 (b)(6). I would not require the district court to inflexibly apply this general principle to the complaint of every inmate, who is in many respects in a different litigating posture than persons who are unconfined. The inmate stands to

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[4] See generally *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (1920); *Levy* v. *Louisiana*, 391 U. S. 68 (1968); *Carrington* v. *Rash*, 380 U. S. 89 (1965), as examples of the spectrum of Fourteenth Amendment review standards.

[5] *Loving* v. *Virginia*, 388 U. S. 1 (1967); *Korematsu* v. *United States*, 323 U. S. 214 (1944).

[6] Petitioner (represented by a lawyer who drafted the complaint) alleged that he was excluded from participation in religious programs and that the exclusion was "arbitrary and unreasonable . . . without any lawful justification." Holding counsel to standards of pleading applied to other prisoners' claims for relief, conclusions of arbitrariness are insufficient, *e. g.*, *Williams* v. *Dunbar*, 377 F. 2d 505 (CA9 1967); *United States ex rel. Hoge* v. *Bolsinger*, 311 F. 2d 215 (CA3 1962).

gain something and lose nothing from a complaint stating facts that he is ultimately unable to prove.[7] Though he may be denied legal relief, he will nonetheless have obtained a short sabbatical in the nearest federal courthouse.[8] To expand the availability of such courtroom appearances by requiring the district court to construe

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[7] "The last type of writ-writer to be discussed writes writs for economic gain. This group is comprised of a few unscrupulous manipulators who are interested only in acquiring from other prisoners money, cigarettes, or merchandise purchased in the inmate canteen. Once they have a 'client's' interest aroused and determine his ability to pay, they must keep him on the 'hook.' This is commonly done by deliberately misstating the facts of his case so that it appears, at least on the surface, that the inmate is entitled to relief. The documents drafted for the client cast the writ-writer in the role of a sympathetic protagonist. After reading them, the inmate is elated that he has found someone able to present his case favorably. He is willing to pay to maintain the lie that has been created for him." Larsen, A Prisoner Looks at Writ-Writing, 56 Calif. L. Rev. 343, 348–349 (1968).

"When decisions do not help a writ-writer, he may employ a handful of tricks which damage his image in the state courts. Some of the not too subtle subterfuges used by a small minority of writ-writers would tax the credulity of any lawyer. One writ-writer simply made up his own legal citations when he ran short of actual ones. In one action against the California Adult Authority involving the application of administrative law, one writ-writer used the following citations: *Aesop v. Fables, First Baptist Church v. Sally Stanford, Doda v. One Forty-four Inch Chest,* and *Dogood v. The Planet Earth.* The references to the volumes and page numbers of the nonexistent publications were equally fantastic, such as 901 *Penal Review,* page 17,240. To accompany each case, he composed an eloquent decision which, if good law, would make selected acts of the Adult Authority unconstitutional. In time the 'decisions' freely circulated among other writ-writers, and several gullible ones began citing them also." *Id.,* at 355.

[8] "[T]emporary relief from prison confinement is always an alluring prospect, and to the hardened criminal the possibility of escape lurks in every excursion beyond prison walls." *Price* v. *Johnston,* 159 F. 2d 234, 237 (CA9 1947).

every inmate's complaint under the liberal rule of *Conley* v. *Gibson* deprives those courts of the latitude necessary to process this ever-increasing species of complaint.[9]

Finally, a factual hearing should not be imperative on remand if dismissal is appropriate on grounds other than failure to state a claim for relief. It is evident from the record before us that the *in forma pauperis* complaint might well have been dismissed as "frivolous or malicious," under the discretion vested in the trial court by 28 U. S. C. § 1915 (d).[10] This power is not limited or impaired by the strictures of Rule 12 (b). *Fletcher* v. *Young*, 222 F. 2d 222 (CA4 1955). Although the trial court based its dismissal on 12 (b)(6) grounds, this record would support a dismissal as frivolous.

The State's answer to the complaint showed that the identical issues of religious freedoms were litigated by another prisoner from the same institution, claiming the

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[9] Cf. *Price* v. *Johnston*, 334 U. S. 266, 284–285 (1948), giving to the courts of appeals the necessary discretion to determine when prisoners should be allowed to argue their habeas corpus appeals in person:

"If it is apparent that the request of the prisoner to argue personally reflects something more than a mere desire to be freed temporarily from the confines of the prison, that he is capable of conducting an intelligent and responsible argument, and that his presence in the courtroom may be secured without undue inconvenience or danger, the court would be justified in issuing the writ."

Here, the question is whether prisoners can in every case be permitted to file a complaint, conduct the full range of pretrial discovery, and commence a trial (including presumably trial by jury) at which he and other prisoners will appear as witnesses. The summary reversal effected here encourages such a result without permitting the district courts to exercise the type of discretion permitted in *Price* and without providing any guidance for their accommodation of the special problems of prisoner litigation with a fair determination of such complaints under 42 U. S. C. § 1983 as are rightfully filed.

[10] *Reece* v. *Washington*, 310 F. 2d 139 (CA9 1962); *Conway* v. *Oliver*, 429 F. 2d 1307 (CA9 1970).

same impairment of the practice of the Buddhist religion, which was brought by the attorney employed at the prison to provide legal services for the inmates. It is not clear whether petitioner here was a party to that suit, as he was to many suits filed by his fellow prisoners. If he was, the instant claim may be barred under the doctrine of *res judicata*. In any event, a prior adjudication of the same claim by another prisoner under identical circumstances would be a substantial factor in a decision to dismiss this claim as frivolous.

In addition, the trial court had before it the dismissal of another of petitioner's cases filed shortly before the instant action, where the trial judge had been exposed to myriad previous actions, and found them to be "voluminous, repetitious, duplicitous and in many instances deceitful." [11] Whether petitioner might have raised his claim in these or several other actions in which he joined other prisoner plaintiffs is also proper foundation for a finding that this complaint is "frivolous or malicious." Whatever might be the posture of this constitutional claim if petitioner had never flooded the courts with repetitive and duplicitous claims, and if it had not recently been adjudicated in an identical proceeding, I believe it could be dismissed as frivolous in the case before us.

[11] R. 30.

DUNN, GOVERNOR OF TENNESSEE, ET AL. *v.* BLUMSTEIN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

No. 70–13. Argued November 16, 1971—Decided March 21, 1972

Tennessee closes its registration books 30 days before an election, but requires residence in the State for one year and in the county for three months as prerequisites for registration to vote. Appellee challenged the constitutionality of the durational residence requirements, and a three-judge District Court held them unconstitutional on the grounds that they impermissibly interfered with the right to vote and created a "suspect" classification penalizing some Tennessee residents because of recent interstate movement. Tennessee asserts that the requirements are needed to insure the purity of the ballot box and to have knowledgeable voters. *Held:* The durational residence requirements are violative of the Equal Protection Clause of the Fourteenth Amendment, as they are not necessary to further a compelling state interest. Pp. 335–360.

(a) Since the requirements deny some citizens the right to vote, "the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest." *Kramer* v. *Union Free School District*, 395 U. S. 621, 627 (emphasis added). Pp. 336–337.

(b) Absent a compelling state interest, Tennessee may not burden the right to travel by penalizing those bona fide residents who have recently traveled from one jurisdiction to another. Pp. 338–342.

(c) A period of 30 days appears to be ample to complete whatever administrative tasks are needed to prevent fraud and insure the purity of the ballot box. Pp. 345–349.

(d) Since there are adequate means of ascertaining bona fide residence on an individualized basis, the State may not conclusively presume nonresidence from failure to satisfy the waiting-period requirements of durational residence laws. Pp. 349–354.

(e) Tennessee has not established a sufficient relationship between its interest in an informed electorate and the fixed durational residence requirements. Pp. 354–360.

337 F. Supp. 323, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and WHITE, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 360. BURGER, C. J., filed a dissenting opinion, *post*, p. 363. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Robert H. Roberts, Assistant Attorney General of Tennessee, argued the cause for appellants. With him on the brief were *David M. Pack,* Attorney General, and *Thomas E. Fox,* Deputy Attorney General.

James F. Blumstein, pro se, argued the cause for appellee. With him on the brief were *Charles Morgan, Jr.,* and *Norman Siegel.*

Henry P. Sailer and *William A. Dobrovir* filed a brief for Common Cause as *amicus curiae* urging affirmance.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Various Tennessee public officials (hereinafter Tennessee) appeal from a decision by a three-judge federal court holding that Tennessee's durational residence requirements for voting violate the Equal Protection Clause of the United States Constitution. The issue arises in a class action for declaratory and injunctive relief brought by appellee James Blumstein. Blumstein moved to Tennessee on June 12, 1970, to begin employment as an assistant professor of law at Vanderbilt University in Nashville. With an eye toward voting in the upcoming August and November elections, he attempted to register to vote on July 1, 1970. The county registrar refused to register him, on the ground that Tennessee law authorizes the registration of only those persons who, at the time of the next election, will have been residents of the State for a year and residents of the county for three months.

After exhausting state administrative remedies, Blumstein brought this action challenging these residence re-

quirements on federal constitutional grounds.[1] A three-judge court, convened pursuant to 28 U. S. C. §§ 2281, 2284, concluded that Tennessee's durational residence

[1] Involved here are provisions of the Tennessee Constitution, as well as portions of the Tennessee Code. Article IV, § 1, of the Tennessee Constitution, provides in pertinent part:

"Right to vote—Election precincts . . . .—Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceding the day of election, shall be entitled to vote for electors for President and Vice-President of the United States, members of the General Assembly and other civil officers for the county or district in which such person resides; and there shall be no other qualification attached to the right of suffrage.

"The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box."

Section 2-201, Tenn. Code Ann. (Supp. 1970) provides:

"Qualifications of voters.—Every person of the age of twenty-one (21) years, being a citizen of the United States and a resident of this state for twelve (12) months, and of the county wherein he may offer his vote for three (3) months next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers for the county or district in which he may reside."

Section 2-304, Tenn. Code Ann. (Supp. 1970) provides:

"Persons entitled to permanently register—Required time for registration to be in effect prior to election.—All persons qualified to vote under existing laws at the date of application for registration, including those who will arrive at the legal voting age by the date of the next succeeding primary or general election established by statute following the date of their application to register (those who become of legal voting age before the date of a general election shall be entitled to register and vote in a legal primary election selecting nominees for such general election), who will have lived in the state for twelve (12) months and in the county for which they applied for registration for three (3) months by the date of the next succeeding election shall be entitled to permanently register as voters under the provisions of this chapter provided,

requirements were unconstitutional (1) because they impermissibly interfered with the right to vote and (2) because they created a "suspect" classification penalizing some Tennessee residents because of recent interstate movement.[2] 337 F. Supp. 323 (MD Tenn. 1970). We noted probable jurisdiction, 401 U. S. 934 (1971). For the reasons that follow, we affirm the decision below.[3]

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however, that registration or re-registration shall not be permitted within thirty (30) days of any primary or general election provided for by statute. If a registered voter in any county shall have changed his residence to another county, or to another ward, precinct, or district within the same county, or changed his name by marriage or otherwise, within ninety (90) days prior to the date of an election, he shall be entitled to vote in his former ward, precinct or district of registration."

[2] On July 30, the District Court refused to grant a preliminary injunction permitting Blumstein and members of the class he represented to vote in the August 6 election; the court noted that to do so would be "so obviously disruptive as to constitute an example of judicial improvidence." The District Court also denied a motion that Blumstein be allowed to cast a sealed provisional ballot for the election.

At the time the opinion below was filed, the next election was to be held in November 1970, at which time Blumstein would have met the three-month part of Tennessee's durational residency requirements. The District Court properly rejected the State's position that the alleged invalidity of the three-month requirement had been rendered moot, and the State does not pursue any mootness argument here. Although appellee now can vote, the problem to voters posed by the Tennessee residence requirements is "'capable of repetition, yet evading review.'" *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969); *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). In this case, unlike *Hall* v. *Beals*, 396 U. S. 45 (1969), the laws in question remain on the books, and Blumstein has standing to challenge them as a member of the class of people affected by the presently written statute.

[3] The important question in this case has divided the lower courts. Durational residence requirements ranging from three months to one year have been struck down in *Burg* v. *Canniffe*, 315 F. Supp. 380 (Mass. 1970); *Affeldt* v. *Whitcomb*, 319 F. Supp. 69 (ND

I

The subject of this lawsuit is the durational residence requirement. Appellee does not challenge Tennessee's power to restrict the vote to bona fide Tennessee residents. Nor has Tennessee ever disputed that appellee was a bona fide resident of the State and county when he attempted to register.[4] But Tennessee insists that, in addition to *being* a resident, a would-be voter must *have been* a resident for a year in the State and three months in the county. It is this additional *durational* residence requirement that appellee challenges.

Durational residence laws penalize those persons who have traveled from one place to another to establish a new residence during the qualifying period. Such laws divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent

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Ind. 1970); *Lester* v. *Board of Elections for District of Columbia*, 319 F. Supp. 505 (DC 1970); *Bufford* v. *Holton*, 319 F. Supp. 843 (ED Va. 1970); *Hadnott* v. *Amos*, 320 F. Supp. 107 (MD Ala. 1970); *Kohn* v. *Davis*, 320 F. Supp. 246 (Vt. 1070); *Keppel* v. *Donovan*, 326 F. Supp. 15 (Minn. 1970); *Andrews* v. *Cody*, 327 F. Supp. 793 (MDNC 1971), as well as this case. Other district courts have upheld durational residence requirements of a similar variety. *Howe* v. *Brown*, 319 F. Supp. 862 (ND Ohio 1970); *Ferguson* v. *Williams*, 330 F. Supp. 1012 (ND Miss. 1971); *Cocanower* v. *Marston*, 318 F. Supp. 402 (Ariz. 1970); *Fitzpatrick* v. *Board of Election Commissioners* (ND Ill. 1970); *Piliavin* v. *Hoel*, 320 F. Supp. 66 (WD Wis. 1970); *Epps* v. *Logan* (No. 9137, WD Wash. 1970); *Fontham* v. *McKeithen*, 336 F. Supp. 153 (ED La. 1971). In *Sirak* v. *Brown* (Civ. No. 70–164, SD Ohio 1970), the District Judge refused to convene a three-judge court and summarily dismissed the complaint.

[4] Noting the lack of dispute on this point, the court below specifically found that Blumstein had no intention of leaving Nashville and was a bona fide resident of Tennessee. 337 F. Supp. 323, 324.

of totally denying them the opportunity to vote.[5] The constitutional question presented is whether the Equal Protection Clause of the Fourteenth Amendment permits a State to discriminate in this way among its citizens.

To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. Cf. *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968). In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interest affected or the classification involved.[6] First, then, we must determine what standard of review is appropriate. In the present case, whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements.

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[5] While it would be difficult to determine precisely how many would-be voters throughout the country cannot vote because of durational residence requirements, but see Cocanower & Rich, Residency Requirements for Voting, 12 Ariz. L. Rev. 477, 478 and n. 8 (1970), it is worth noting that during the period 1947–1970 an average of approximately 3.3% of the total national population moved interstate each year. (An additional 3.2% of the population moved from one county to another *intrastate* each year.) U. S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Population Characteristics, Series P–20, No. 210, Jan. 15, 1971, Table 1, pp. 7–8.

[6] Compare *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969), and *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942), with *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955); compare *McLaughlin* v. *Florida*, 379 U. S. 184 (1964), *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966), and *Graham* v. *Richardson*, 403 U. S. 365 (1971), with *Morey* v. *Doud*, 354 U. S. 457 (1957), and *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522 (1959).

A

Durational residence requirements completely bar from voting all residents not meeting the fixed durational standards. By denying some citizens the right to vote, such laws deprive them of "'a fundamental political right, . . . preservative of all rights.'" *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964). There is no need to repeat now the labors undertaken in earlier cases to analyze this right to vote and to explain in detail the judicial role in reviewing state statutes that selectively distribute the franchise. In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. See, *e. g.*, *Evans* v. *Cornman*, 398 U. S. 419, 421–422, 426 (1970); *Kramer* v. *Union Free School District*, 395 U. S. 621, 626–628 (1969); *Cipriano* v. *City of Houma*, 395 U. S. 701, 706 (1969); *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 667 (1966); *Carrington* v. *Rash*, 380 U. S. 89, 93–94 (1965); *Reynolds* v. *Sims*, *supra*. This "equal right to vote," *Evans* v. *Cornman*, *supra*, at 426, is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. See, *e. g.*, *Carrington* v. *Rash*, *supra*, at 91; *Oregon* v. *Mitchell*, 400 U. S. 112, 144 (opinion of DOUGLAS, J.), 241 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.), 294 (opinion of STEWART, J., concurring and dissenting, with whom BURGER, C. J., and BLACKMUN, J., joined). But, as a general matter, "before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *Evans* v. *Cornman*, *supra*, at 422; see *Bullock* v. *Carter*, *ante*, p. 134, at 143.

Tennessee urges that this case is controlled by *Drueding* v. *Devlin*, 380 U. S. 125 (1965). *Drueding* was a decision upholding Maryland's durational residence requirements. The District Court tested those requirements by the equal protection standard applied to ordinary state regulations: whether the exclusions are reasonably related to a permissible state interest. 234 F. Supp. 721, 724–725 (Md. 1964). We summarily affirmed *per curiam* without the benefit of argument. But if it was not clear then, it is certainly clear now that a more exacting test is required for any statute that "place[s] a condition on the exercise of the right to vote." *Bullock* v. *Carter*, *supra*, at 143. This development in the law culminated in *Kramer* v. *Union Free School District*, *supra*. There we canvassed in detail the reasons for strict review of statutes distributing the franchise, 395 U. S., at 626–630, noting *inter alia* that such statutes "constitute the foundation of our representative society." We concluded that if a challenged statute grants the right to vote to some citizens and denies the franchise to others, "the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest." *Id.*, at 627 (emphasis added); *Cipriano* v. *City of Houma*, *supra*, at 704; *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204, 205, 209 (1970). Cf. *Harper* v. *Virginia Board of Elections*, *supra*, at 670. This is the test we apply here.[7]

[7] Appellants also rely on *Pope* v. *Williams*, 193 U. S. 621 (1904). Carefully read, that case simply *holds* that federal constitutional rights are not violated by a state provision requiring a person who enters the State to make a "declaration of his intention to become a citizen before he can have the right to be registered as a voter and to vote in the State." *Id.*, at 634. In other words, the case simply stands for the proposition that a State may require voters to be bona fide residents. See *infra*, at 343–344. To the extent that dicta in that opinion are inconsistent with the test we apply or the result we reach today, those dicta are rejected.

B

This exacting test is appropriate for another reason, never considered in *Drueding:* Tennessee's durational residence laws classify bona fide residents on the basis of recent travel, penalizing those persons, and only those persons, who have gone from one jurisdiction to another during the qualifying period. Thus, the durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel.

"[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *United States* v. *Guest,* 383 U. S. 745, 758 (1966). See *Passenger Cases,* 7 How. 283, 492 (1849) (Taney, C. J.); *Crandall* v. *Nevada,* 6 Wall. 35, 43–44 (1868); *Paul* v. *Virginia,* 8 Wall. 168, 180 (1869); *Edwards* v. *California,* 314 U. S. 160 (1941); *Kent* v. *Dulles,* 357 U. S. 116, 126 (1958); *Shapiro* v. *Thompson,* 394 U. S. 618, 629–631, 634 (1969); *Oregon* v. *Mitchell,* 400 U. S., at 237 (separate opinon of BRENNAN, WHITE, and MARSHALL, JJ.), 285–286 (STEWART, J., concurring and dissenting, with whom BURGER, C. J., and BLACKMUN, J., joined). And it is clear that the freedom to travel includes the "freedom to enter and abide in any State in the Union," *id.,* at 285. Obviously, durational residence laws single out the class of bona fide state and county residents who have recently exercised this constitutionally protected right, and penalize such travelers directly. We considered such a durational residence requirement in *Shapiro* v. *Thompson, supra,* where the pertinent statutes imposed a one-year waiting period for interstate migrants as a condition to receiving welfare benefits. Although in *Shapiro* we specifically did not decide whether durational residence requirements could be used to determine voting eligibility,

id., at 638 n. 21, we concluded that since the right to travel was a constitutionally protected right, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Id.*, at 634. This compelling-state-interest test was also adopted in the separate concurrence of MR. JUSTICE STEWART. Preceded by a long line of cases recognizing the constitutional right to travel, and repeatedly reaffirmed in the face of attempts to disregard it, see *Wyman* v. *Bowens*, 397 U. S. 49 (1970), and *Wyman* v. *Lopez*, 404 U. S. 1055 (1972), *Shapiro* and the compelling-state-interest test it articulates control this case.

Tennessee attempts to distinguish *Shapiro* by urging that "the vice of the welfare statute in *Shapiro* . . . was its objective to deter interstate travel." Brief for Appellants 13. In Tennessee's view, the compelling-state-interest test is appropriate only where there is "some evidence to indicate a deterrence of or infringement on the right to travel . . . ." *Ibid.* Thus, Tennessee seeks to avoid the clear command of *Shapiro* by arguing that durational residence requirements for voting neither seek to nor actually do deter such travel. In essence, Tennessee argues that the right to travel is not abridged here in any constitutionally relevant sense.

This view represents a fundamental misunderstanding of the law.[8] It is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel"

[8] We note that in the Voting Rights Act of 1965, as amended, Congress specifically found that a durational residence requirement "denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines . . . ." 84 Stat. 316, 42 U. S. C. § 1973aa–1 (a)(2).

cases in this Court always relied on the presence of actual deterrence.[9] In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by "any classification which serves to *penalize* the exercise of that right [to travel] . . . ." *Id.*, at 634 (emphasis added); see *id.*, at 638 n. 21.[10] While noting the frank legislative purpose to deter migration by the poor, and speculating that "[a]n indigent who desires to migrate . . . will doubtless hesitate if he knows that he must risk" the loss of benefits, *id.*, at 629, the majority found no need to dispute the "evidence that few welfare recipients have in fact been deterred [from moving] by residence requirements." *Id.*, at 650 (Warren, C. J., dissenting); see also *id.*, at 671–672 (Harlan, J., dissenting). Indeed, none of the litigants had themselves been deterred. Only last Term, it was specifically noted that because a durational

[9] For example, in *Crandall* v. *Nevada*, 6 Wall. 35 (1868), the tax imposed on persons leaving the State by commercial carrier was only $1, certainly a minimal deterrent to travel. But in declaring the tax unconstitutional, the Court reasoned that "if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars," *id.*, at 46. In *Ward* v. *Maryland*, 12 Wall. 418 (1871), the tax on nonresident traders was more substantial, but the Court focused on its discriminatory aspects, without anywhere considering the law's effect, if any, on trade or tradesmen's choice of residence. Cf. *Chalker* v. *Birmingham & N. W. R. Co.*, 249 U. S. 522, 527 (1919); but see *Williams* v. *Fears*, 179 U. S. 270 (1900). In *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 79–80 (1920), the Court held that New York could not deny nonresidents certain small personal exemptions from the state income tax allowed residents. The amounts were certainly insufficient to influence any employee's choice of residence. Compare *Toomer* v. *Witsell*, 334 U. S. 385 (1948), with *Mullaney* v. *Anderson*, 342 U. S. 415 (1952).

[10] Separately concurring, MR. JUSTICE STEWART concluded that quite apart from any purpose to deter, "a law that so clearly *impinges* upon the constitutional right of interstate travel must be shown to reflect a *compelling* governmental interest." *Id.*, at 643–644 (first emphasis added). See also *Graham* v. *Richardson*, 403 U. S., at 375.

residence requirement for voting "operates to *penalize* those persons, and only those persons, who have exercised their constitutional right of interstate migration . . . , [it] may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest." *Oregon* v. *Mitchell*, 400 U. S., at 238 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.) (emphasis added).

Of course, it is true that the two individual interests affected by Tennessee's durational residence requirements are affected in different ways. Travel is permitted, but only at a price; voting is prohibited. The right to travel is merely penalized, while the right to vote is absolutely denied. But these differences are irrelevant for present purposes. *Shapiro* implicitly realized what this Court has made explicit elsewhere:

> "It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . . . 'Constitutional rights would be of little value if they could be . . . indirectly denied' . . . ." *Harman* v. *Forssenius*, 380 U. S. 528, 540 (1965).[11]

See also *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), and cases cited therein; *Spevack* v. *Klein*, 385 U. S. 511, 515 (1967). The right to travel is an "*unconditional* personal right," a right whose exercise may not be conditioned. *Shapiro* v. *Thompson*, 394 U. S., at 643 (STEWART, J., concurring) (emphasis added); *Oregon* v. *Mitchell*, *supra*, at 292 (STEWART, J., concurring and dissenting,

[11] In *Harman*, the Court held that a Virginia law which allowed federal voters to qualify either by paying a poll tax or by filing a certificate of residence six months before the election "handicap[ped] exercise" of the right to participate in federal elections free of poll taxes, guaranteed by the Twenty-fourth Amendment. *Id.*, at 541.

with whom BURGER, C. J., and BLACKMUN, J., joined). Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right.[12] In the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote. Cf. *United States* v. *Jackson*, 390 U. S. 570, 582–583 (1968). Absent a compelling state interest, a State may not burden the right to travel in this way.[13]

C

In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are "*necessary* to promote a *compelling* governmental interest." *Shapiro* v. *Thompson*, *supra*, at 634 (first emphasis added); *Kramer* v. *Union Free School District*, 395 U. S., at 627. Thus phrased, the constitutional question may sound like a mathematical formula. But legal "tests" do not have the precision of mathe-

[12] Where, for example, an interstate migrant loses his driver's license because the new State has a higher age requirement, a different constitutional question is presented. For in such a case, the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive. See *Shapiro* v. *Thompson*, 394 U. S. 618, 638 n. 21 (1969).

[13] As noted *infra*, at 343–344, States may show an overriding interest in imposing an appropriate bona fide residence requirement on would-be voters. One who travels out of a State may no longer be a bona fide resident, and may not be allowed to vote in the old State. Similarly, one who travels to a new State may, in some cases, not establish bona fide residence and may be ineligible to vote in the new State. Nothing said today is meant to cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements.

matical formulas. The key words emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes.

It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," *NAACP* v. *Button*, 371 U. S. 415, 438 (1963); *United States* v. *Robel*, 389 U. S. 258, 265 (1967), and must be "tailored" to serve their legitimate objectives. *Shapiro* v. *Thompson*, *supra*, at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960).

II

We turn, then, to the question of whether the State has shown that durational residence requirements are needed to further a sufficiently substantial state interest. We emphasize again the difference between bona fide residence requirements and durational residence requirements. We have in the past noted approvingly that the States have the power to require that voters be bona fide residents of the relevant political subdivision. *E. g.*, *Evans* v. *Cornman*, 398 U. S., at 422; *Kramer* v. *Union Free School District*, *supra*, at 625; *Carrington* v. *Rash*, 380 U. S., at 91; *Pope* v. *Williams*, 193 U. S. 621 (1904).[14] An appropriately defined and uniformly applied require-

[14] See n. 7, *supra*.

ment of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny.[15] But *durational* residence requirements, representing a separate voting qualification imposed on bona fide residents, must be separately tested by the stringent standard. Cf. *Shapiro* v. *Thompson, supra,* at 636.

It is worth noting at the outset that Congress has, in a somewhat different context, addressed the question whether durational residence laws further compelling state interests. In § 202 of the Voting Rights Act of 1965, added by the Voting Rights Act Amendments of 1970, Congress outlawed state durational residence requirements for presidential and vice-presidential elections, and prohibited the States from closing registration more than 30 days before such elections. 42 U. S. C. § 1973aa–1. In doing so, it made a specific finding that durational residence requirements and more restrictive registration practices do "not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections." 42 U. S. C. § 1973aa–1 (a)(6). We upheld this portion of the Voting Rights Act in *Oregon* v. *Mitchell, supra.* In our present case, of course, we deal with congressional, state, and local elections, in which the State's interests are arguably somewhat different; and, in addition, our function is not merely to determine whether there was a reasonable basis for Congress' findings. However, the congressional finding which forms the basis for the Federal Act is a useful background for the discussion that follows.

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[15] See *Fontham* v. *McKeithen,* 336 F. Supp., at 167–168 (Wisdom, J., dissenting); *Pope* v. *Williams,* 193 U. S. 621 (1904); and n. 7, *supra.*

Tennessee tenders "two basic purposes" served by its durational residence requirements:

> "(1) INSURE PURITY OF BALLOT BOX—Protection against fraud through colonization and inability to identify persons offering to vote, and
>
> "(2) KNOWLEDGEABLE VOTER—Afford some surety that the voter has, in fact, become a member of the community and that as such, he has a common interest in all matters pertaining to its government and is, therefore, more likely to exercise his right more intelligently." Brief for Appellants 15, citing 18 Am. Jur., Elections, § 56, p. 217.

We consider each in turn.

A

Preservation of the "purity of the ballot box" is a formidable-sounding state interest. The impurities feared, variously called "dual voting" and "colonization," all involve voting by nonresidents, either singly or in groups. The main concern is that nonresidents will temporarily invade the State or county, falsely swear that they are residents to become eligible to vote, and, by voting, allow a candidate to win by fraud. Surely the prevention of such fraud is a legitimate and compelling government goal. But it is impossible to view durational residence requirements as necessary to achieve that state interest.

Preventing fraud, the asserted evil that justifies state lawmaking, means keeping nonresidents from voting. But, by definition, a durational residence law bars *newly arrived* residents from the franchise along with nonresidents. The State argues that such sweeping laws are necessary to prevent fraud because they are needed to identify bona fide residents. This contention is particu-

larly unconvincing in light of Tennessee's total statutory scheme for regulating the franchise.

Durational residence laws may once have been necessary to prevent a fraudulent evasion of state voter standards, but today in Tennessee, as in most other States,[16] this purpose is served by a system of voter registration. Tenn. Code Ann. § 2–301 *et seq.* (1955 and Supp. 1970); see *State* v. *Weaver,* 122 Tenn. 198, 122 S. W. 465 (1909). Given this system, the record is totally devoid of any evidence that durational residence requirements are in fact necessary to identify bona fide residents. The qualifications of the would-be voter in Tennessee are determined when he registers to vote, which he may do until 30 days before the election. Tenn. Code Ann. § 2–304. His qualifications—including bona fide residence—are established then by oath. Tenn. Code Ann. § 2–309. There is no indication in the record that Tennessee routinely goes behind the would-be voter's oath to determine his qualifications. Since false swearing is no obstacle to one intent on fraud, the existence of burdensome voting qualifications like durational residence requirements cannot prevent corrupt nonresidents from fraudulently registering and voting. As long as the State relies on the oath-swearing system to establish qualifications, a durational residence requirement adds nothing to a simple residence requirement in the effort to stop fraud. The nonresident intent on committing election fraud will as quickly and effectively swear that he has been a resident for the requisite period of time as he would swear that he was simply a resident. Indeed, the durational residence requirement becomes an effective voting obstacle

[16] See, *e. g.,* Cocanower & Rich, 12 Ariz. L. Rev., at 499; MacLeod & Wilberding, State Voting Residency Requirements and Civil Rights, 38 Geo. Wash. L. Rev. 93, 113 (1969).

only to residents who tell the truth and have no fraudulent purposes.

Moreover, to the extent that the State makes an enforcement effort after the oath is sworn, it is not clear what role the durational residence requirement could play in protecting against fraud. The State closes the registration books 30 days before an election to give officials an opportunity to prepare for the election. Before the books close, anyone may register who claims that he will meet the durational residence requirement at the time of the next election. Although Tennessee argues that this 30-day period between registration and election does not give the State enough time to verify this claim of bona fide residence, we do not see the relevance of that position to this case. As long as the State permits registration up to 30 days before an election, a lengthy durational residence requirement does not increase the amount of time the State has in which to carry out an investigation into the sworn claim by the would-be voter that he is in fact a resident.

Even if durational residence requirements imposed, in practice, a pre-election waiting period that gave voting officials three months or a year in which to confirm the bona fides of residence, Tennessee would not have demonstrated that these waiting periods were necessary. At the outset, the State is faced with the fact that it must defend two separate waiting periods of different lengths. It is impossible to see how both could be "necessary" to fulfill the pertinent state objective. If the State itself has determined that a three-month period is enough time in which to confirm bona fide residence in the State and county, obviously a one-year period cannot also be justified as "necessary" to achieve the same purpose.[17]

[17] Obviously, it could not be argued that the three-month waiting period is necessary to confirm residence in the county, and the one-year period necessary to confirm residence in the State. Quite

Beyond that, the job of detecting nonresidents from among persons who have registered is a relatively simple one. It hardly justifies prohibiting all newcomers from voting for even three months. To prevent dual voting, state voting officials simply have to cross-check lists of new registrants with their former jurisdictions. See Comment, Residence Requirements for Voting in Presidential Elections, 37 U. Chi. L. Rev. 359, 364 and n. 34, 374 (1970); cf. *Shapiro* v. *Thompson*, 394 U. S., at 637. Objective information tendered as relevant to the question of bona fide residence under Tennessee law—places of dwelling, occupation, car registration, driver's license, property owned, etc.[18]—is easy to doublecheck, especially in light of modern communications. Tennessee itself concedes that "[i]t might well be that these purposes can be achieved under requirements of shorter duration than that imposed by the State of Tennessee . . . ." Brief for Appellants 10. Fixing a constitutionally acceptable period is surely a matter of degree. It is sufficient to note here that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much. This was the judgment of Congress in the context of presidential elections.[19] And, on the basis of the stat-

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apart from the total implausibility of any suggestion that one task should take four times as long as the other, it is sufficient to note that if a person is found to be a bona fide resident of a county within the State, he is by definition a bona fide resident of the State as well.

[18] See, *e. g.*, *Brown* v. *Hows*, 163 Tenn. 178, 42 S. W. 2d 210 (1930); *Sparks* v. *Sparks*, 114 Tenn. 666, 88 S. W. 173 (1905). See generally Tennessee Law Revision Commission, Title 2—Election Laws, Tentative Draft of October 1971, § 222 and Comment. See n. 22, *infra*.

[19] In the Voting Rights Act Amendments of 1970, Congress abolished durational residence requirements as a precondition to voting

utory scheme before us, it is almost surely the judgment of the Tennessee lawmakers as well. As the court below concluded, the cutoff point for registration 30 days before an election

> "reflects the judgment of the Tennessee Legislature that thirty days is an adequate period in which Tennessee's election officials can effect whatever measures may be necessary, in each particular case confronting them, to insure purity of the ballot and prevent dual registration and dual voting." 337 F. Supp., at 330.

It has been argued that durational residence requirements are permissible because a person who has satisfied the waiting-period requirements is conclusively presumed to be a bona fide resident. In other words, durational residence requirements are justified because they create an administratively useful conclusive presumption that recent arrivals are not residents and are therefore prop-

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in presidential and vice-presidential elections, and prohibited the States from cutting off registration more than 30 days prior to those elections. These limits on the waiting period a State may impose prior to an election were made "with full cognizance of the possibility of fraud and administrative difficulty." *Oregon* v. *Mitchell*, 400 U. S. 112, 238 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.). With that awareness, Congress concluded that a waiting-period requirement beyond 30 days "does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections." 42 U. S. C. § 1973aa–1 (a)(6). And in sustaining § 202 of the Voting Rights Act of 1965, we found "no explanation why the 30-day period between the closing of new registrations and the date of election would not provide, in light of modern communications, adequate time to insure against . . . frauds." *Oregon* v. *Mitchell*, *supra*, at 239 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.). There is no reason to think that what Congress thought was unnecessary to prevent fraud in presidential elections should not also be unnecessary in the context of other elections. See *infra*, at 354.

erly barred from the franchise.[20] This presumption, so the argument runs, also prevents fraud, for few candidates will be able to induce migration for the purpose of voting if fraudulent voters are required to remain in the false locale for three months or a year in order to vote on election day.[21]

In *Carrington* v. *Rash*, 380 U. S. 89, this Court considered and rejected a similar kind of argument in support of a similar kind of conclusive presumption. There, the State argued that it was difficult to tell whether persons moving to Texas while in the military service were in fact bona fide residents. Thus, the State said, the administrative convenience of avoiding difficult factual determinations justified a blanket exclusion of all servicemen stationed in Texas. The presumption created there was conclusive—" 'incapable of being overcome by proof of the most positive character.' " *Id.*, at 96, citing *Heiner* v. *Donnan*, 285 U. S. 312, 324 (1932). The

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[20] As a technical matter, it makes no sense to say that one who has been a resident for a fixed duration is presumed to be a resident. In order to meet the durational residence requirement, one must, by definition, *first* establish that he is a *resident*. A durational residence requirement is not simply a waiting period after arrival in the State; it is a waiting period after *residence* is established. Thus it is conceptually impossible to say that a durational residence requirement is an administratively useful device to determine residence. The State's argument must be that residence would be presumed from simple *presence* in the State or county for the fixed waiting period.

[21] It should be clear that this argument assumes that the State will reliably determine whether the sworn claims of duration in the jurisdiction are themselves accurate. We have already noted that this is unlikely. See *supra*, at 346. Another recurrent problem for the State's position is the existence of *differential* durational residence requirements. If the State presumes residence in the county after three months in the county, there is no rational explanation for requiring a full 12 months' presence in the State to presume residence in the State.

Court rejected this "conclusive presumption" approach as violative of the Equal Protection Clause. While many servicemen in Texas were not bona fide residents, and therefore properly ineligible to vote, many servicemen clearly were bona fide residents. Since "more precise tests" were available "to winnow successfully from the ranks . . . those whose residence in the State is bona fide," conclusive presumptions were impermissible in light of the individual interests affected. *Id.*, at 95. "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Id.*, at 96.

Carrington sufficiently disposes of this defense of durational residence requirements. The State's legitimate purpose is to determine whether certain persons in the community are bona fide residents. A durational residence requirement creates a classification that may, in a crude way, exclude nonresidents from that group. But it also excludes many residents. Given the State's legitimate purpose and the individual interests that are affected, the classification is all too imprecise. See *supra*, at 343. In general, it is not very difficult for Tennessee to determine on an individualized basis whether one recently arrived in the community is in fact a resident, although of course there will always be difficult cases. Tennessee has defined a test for bona fide residence, and appears prepared to apply it on an individualized basis in various legal contexts.[22] That test

[22] Tennessee's basic test for bona fide residence is (1) an intention to stay indefinitely in a place (in other words, "without a present intention of removing therefrom," *Brown* v. *Hows*, 163 Tenn., at 182, 42 S. W. 2d, at 211), joined with (2) some objective indication consistent with that intent, see n. 18, *supra*. This basic test has been applied in divorce cases, see, *e. g.*, *Sturdavant* v. *Sturdavant*, 28 Tenn. App. 273, 189 S. W. 2d 410 (1944); *Brown* v. *Brown*, 150 Tenn. 89, 261 S. W. 959 (1924); *Sparks* v. *Sparks*, 114

could easily be applied to new arrivals. Furthermore, if it is unlikely that would-be fraudulent voters would remain in a false locale for the lengthy period imposed by durational residence requirements, it is just as unlikely that they would collect such objective indicia of bona fide residence as a dwelling, car registration, or driver's license. In spite of these things, the question of bona fide residence is settled for new arrivals by conclusive presumption, not by individualized inquiry. Cf. *Carrington* v. *Rash, supra,* at 95–96. Thus, it has always been undisputed that appellee Blumstein is himself a bona fide resident of Tennessee within the ordinary state definition of residence. But since Tennessee's presumption from failure to meet the durational residence requirements is conclusive, a showing of actual bona fide residence is irrelevant, even though such a showing would fully serve the State's purposes embodied in the presumption and would achieve those purposes with far less drastic impact on constitutionally protected interests.[23] The Equal Protection Clause places a limit on government by classification, and that limit has been exceeded here. Cf. *Shapiro* v. *Thompson,* 394 U. S., at 636; *Harman* v. *Forssenius,* 380 U. S., at 542–543; *Carrington* v. *Rash, supra,* at 95–96; *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942).

Tenn. 666, 88 S. W. 173 (1905); in tax cases, see, *e. g., Denny* v. *Sumner County,* 134 Tenn. 468, 184 S. W. 14 (1916); in estate cases, see, *e. g., Caldwell* v. *Shelton,* 32 Tenn. App. 45, 221 S. W. 2d 815 (1948); *Hascall* v. *Hafford,* 107 Tenn. 355, 65 S. W. 423 (1901); and in voting cases, see, *e. g., Brown* v. *Hows, supra;* Tennessee Law Revision Commission, Title 2—Election Laws, *supra,* n. 18.

[23] Indeed, in Blumstein's case, the County Election Commission explicitly rejected his offer to treat the waiting-period requirement as "a waivable guide to commission action, but rebuttable upon a proper showing of competence to vote intelligently in the primary and general election." Complaint at App. 8. Cf. *Skinner* v. *Oklahoma,* 316 U. S., at 544–545 (Stone, C. J., concurring).

Our conclusion that the waiting period is not the least restrictive means necessary for preventing fraud is bolstered by the recognition that Tennessee has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared.[24] At least six separate sections of the Tennessee Code define offenses to deal with voter fraud. For example, Tenn. Code Ann. § 2–324 makes it a crime "for any person to register or to have his name registered as a qualified voter . . . when he is not entitled to be so registered . . . or to procure or induce any other person to register or be registered . . . when such person is not legally qualified to be registered as such . . . ." [25] In addition to the various criminal penalties, Tennessee permits the bona fides of a voter to be challenged on election day. Tenn. Code Ann. § 2–1309 *et seq.* (1955 and Supp. 1970). Where a State has available such remedial action

[24] See *Harman* v. *Forssenius*, 380 U. S., at 543 (1965) (filing of residence certificate six months before election in lieu of poll tax unnecessary to insure that the election is limited to bona fide residents in light of "numerous devices to enforce valid residence requirements"); cf. *Schneider* v. *State*, 308 U. S. 147, 164 (1939) (fear of fraudulent solicitations cannot justify permit requests since "[f]rauds may be denounced as offenses and punished by law").

[25] Tenn. Code Ann. § 2–1614 (Supp. 1970) makes it a felony for any person who "is not legally entitled to vote at the time and place where he votes or attempts to vote . . . , to vote or offer to do so," or to aid and abet such illegality. Tenn. Code Ann. § 2–2207 (1955) makes it a misdemeanor "for any person knowingly to vote in any political convention or any election held under the Constitution or laws of this state, not being legally qualified to vote . . . ," and Tenn. Code Ann. § 2–2208 (1955) makes it a misdemeanor to aid in such an offense. Tenn. Code Ann. § 2–202 (Supp. 1970) makes it an offense to vote outside the ward or precinct where one resides and is registered. Finally, Tenn. Code Ann. § 2–2209 (1955) makes it unlawful to "bring or aid in bringing any fraudulent voters into this state for the purpose of practising a fraud upon or in any primary or final election . . . ." See, *e. g.*, *State* v. *Weaver*, 122 Tenn. 198, 112 S. W. 465 (1909).

to supplement its voter registration system, it can hardly argue that broadly imposed political disabilities such as durational residence requirements are needed to deal with the evils of fraud. Now that the Federal Voting Rights Act abolishes those residence requirements as a precondition for voting in presidential and vice-presidential elections, 42 U. S. C. § 1973aa–1, it is clear that the States will have to resort to other devices available to prevent nonresidents from voting. Especially since every State must live with this new federal statute, it is impossible to believe that durational residence requirements are necessary to meet the State's goal of stopping fraud.[26]

B

The argument that durational residence requirements further the goal of having "knowledgeable voters" appears to involve three separate claims. The first is that such requirements "afford some surety that the voter has, in fact, become a member of the community." But here the State appears to confuse a bona fide residence requirement with a durational residence requirement. As already noted, a State does have an interest in limiting the franchise to bona fide members of the community. But this does not justify or explain the exclusion from the franchise of persons, not because their bona fide residence is questioned, but because they are recent rather than longtime residents.

The second branch of the "knowledgeable voters" justification is that durational residence requirements assure that the voter "has a common interest in all matters pertaining to [the community's] government . . . ." By this, presumably, the State means that it may require a period of residence sufficiently lengthy to impress upon

[26] We note that in the period since the decision below, several elections have been held in Tennessee. We have been presented with no specific evidence of increased colonization or other fraud.

its voters the local viewpoint. This is precisely the sort of argument this Court has repeatedly rejected. In *Carrington* v. *Rash,* for example, the State argued that military men newly moved into Texas might not have local interests sufficiently in mind, and therefore could be excluded from voting in state elections. This Court replied:

> "But if they are in fact residents, . . . they, as all other qualified residents, have a right to an equal opportunity for political representation. . . . 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." 380 U. S., at 94.

See 42 U. S. C. § 1973aa–1 (a)(4).

Similarly here, Tennessee's hopes for voters with a "common interest in all matters pertaining to [the community's] government" is impermissible.[27] To paraphrase what we said elsewhere, "All too often, lack of a ['common interest'] might mean no more than a different interest." *Evans* v. *Cornman,* 398 U. S., at 423. "[D]ifferences of opinion" may not be the basis for excluding any group or person from the franchise. *Cipriano* v. *City of Houma,* 395 U. S., at 705–706. "[T]he fact that newly arrived [Tennesseeans] may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of the region from which they have come, is a constitutionally impermissible reason for depriving them of their chance to influence the

[27] It has been noted elsewhere, and with specific reference to Tennessee law, that "[t]he historical purpose of [durational] residency requirements seems to have been to deny the vote to undesirables, immigrants and outsiders with different ideas." Cocanower & Rich, 12 Ariz. L. Rev., at 484 and nn. 44, 45, and 46. We do not rely on this alleged original purpose of durational residence requirements in striking them down today.

electoral vote of their new home State." *Hall* v. *Beals*, 396 U. S. 45, 53–54 (1969) (dissenting opinion).[28]

Finally, the State urges that a longtime resident is "more likely to exercise his right [to vote] more intelligently." To the extent that this is different from the previous argument, the State is apparently asserting an interest in limiting the franchise to voters who are knowledgeable about the issues. In this case, Tennessee argues that people who have been in the State less than a year and the county less than three months are likely to be unaware of the issues involved in the congressional, state, and local elections, and therefore can be barred from the franchise. We note that the criterion of "intelligent" voting is an elusive one, and susceptible of abuse. But without deciding as a general matter the extent to which a State can bar less knowledgeable or intelligent citizens from the franchise, cf. *Evans* v. *Cornman*, 398 U. S., at 422; *Kramer* v. *Union Free School District*, 395 U. S., at 632; *Cipriano* v. *City*

[28] Tennessee may be revealing this impermissible purpose when it observes:

"The fact that the voting privilege has been extended to 18 year old persons . . . increases, rather than diminishes, the need for durational residency requirements. . . . It is so generally known, as to be judicially accepted, that there are many political subdivisions in this state, and other states, wherein there are colleges, universities and military installations with sufficient student body or military personnel over eighteen years of age, as would completely dominate elections in the district, county or municipality so located. This would offer the maximum of opportunity for fraud through colonization, and permit domination by those not knowledgeable or having a common interest in matters of government, as opposed to the interest and the knowledge of permanent members of the community. Upon completion of their schooling, or service tour, they move on, leaving the community bound to a course of political expediency not of its choice and, in fact, one over which its more permanent citizens, who will continue to be affected, had no control." Brief for Appellants 15–16.

of Houma, 395 U. S., at 705,[29] we conclude that durational residence requirements cannot be justified on this basis.

In *Kramer* v. *Union Free School District*, *supra*, we held that the Equal Protection Clause prohibited New York State from limiting the vote in school-district elections to parents of school children and to property owners. The State claimed that since nonparents would be "less informed" about school affairs than parents, *id.*, at 631, the State could properly exclude the class of nonparents in order to limit the franchise to the more "interested" group of residents. We rejected that position, concluding that a "close scrutiny of [the classification] demonstrates that [it does] not accomplish this purpose with sufficient precision . . . ." *Id.*, at 632. That scrutiny revealed that the classification excluding nonparents from the franchise kept many persons from voting who were as substantially interested as those allowed to vote; given this, the classification was insufficiently "tailored" to achieve the articulated state goal. *Ibid.* See also *Cipriano* v. *City of Houma*, *supra*, at 706.

Similarly, the durational residence requirements in this case founder because of their crudeness as a device for

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[29] In the 1970 Voting Rights Act, which added § 201, 42 U. S. C. § 1973aa, Congress provided that "no citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election . . . ." The term "test or device" was defined to include, in part, "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject . . . ." By prohibiting various "test[s]" and "device[s]" that would clearly assure knowledgeability on the part of voters in local elections, Congress declared federal policy that people should be allowed to vote even if they were not well informed about the issues. We upheld § 201 in *Oregon* v. *Mitchell*, *supra*.

achieving the articulated state goal of assuring the knowledgeable exercise of the franchise. The classifications created by durational residence requirements obviously permit any longtime resident to vote regardless of his knowledge of the issues—and obviously many longtime residents do not have any. On the other hand, the classifications bar from the franchise many other, admittedly new, residents who have become at least minimally, and often fully, informed about the issues. Indeed, recent migrants who take the time to register and vote shortly after moving are likely to be those citizens, such as appellee, who make it a point to be informed and knowledgeable about the issues. Given modern communications, and given the clear indication that campaign spending and voter education occur largely during the month before an election,[30] the State cannot seriously maintain that it is "necessary" to reside for a year in the State and three months in the county in order to be knowledgeable about congressional, state, or even purely local elections. There is simply nothing in the record to support the conclusive presumption that residents who have lived in the State for less than a year and their county for less than three months are uninformed about elections. Cf. *Shapiro* v. *Thompson,* 394 U. S., at 631. These durational residence requirements crudely exclude large numbers of fully qualified people. Especially since Tennessee creates a waiting period by closing registration books 30 days before an election, there can be no basis for arguing that any durational residence requirement is also needed to assure knowledgeability.

It is pertinent to note that Tennessee has never made an attempt to further its alleged interest in an informed electorate in a universally applicable way. Knowledge

[30] H. Alexander, Financing the 1968 Election 106–113 (1971); *Affeldt* v. *Whitcomb,* 319 F. Supp., at 77; Cocanower & Rich, 12 Ariz. L. Rev., at 498.

or competence has never been a criterion for participation in Tennessee's electoral process for longtime residents. Indeed, the State specifically provides for voting by various types of absentee persons.[31] These provisions permit many longtime residents who leave the county or State to participate in a constituency in which they have only the slightest political interest, and from whose political debates they are likely to be cut off. That the State specifically permits such voting is not consistent with its claimed compelling interest in intelligent, informed use of the ballot. If the State seeks to assure intelligent use of the ballot, it may not try to serve this interest only with respect to new arrivals. Cf. *Shapiro* v. *Thompson, supra,* at 637–638.

It may well be true that new residents as a group know less about state and local issues than older residents; and it is surely true that durational residence requirements will exclude some people from voting who are totally un-

[31] The general provisions for absentee voting apply in part to "[a]ny registered voter otherwise qualified to vote in any election to be held in this state or any county, municipality, or other political subdivision thereof, who by reason of business, occupation, health, education, or travel, is required to be absent from the county of his fixed residence on the day of the election . . . ." Tenn. Code Ann. § 2–1602 (Supp. 1970). See generally Tenn. Code Ann. § 2–1601 *et seq.* (Supp. 1970). An alternative method of absentee voting for armed forces members and federal personnel is detailed in Tenn. Code Ann. § 2–1701 *et seq.* (Supp. 1970). Both those provisions allow persons who are still technically "residents" of the State or county to vote even though they are not physically present, and even though they are likely to be uninformed about the issues. In addition, Tennessee has an unusual provision that permits persons to vote in their *prior* residence for a period after residence has been changed. This section provides, in pertinent part: "If a registered voter in any county shall have changed his residence to another county . . . within ninety (90) days prior to the date of an election, he shall be entitled to vote in his former ward, precinct or district of registration." Tenn. Code Ann. § 2–304 (Supp. 1970). See also Tenn. Code Ann. § 2–204 (1955).

informed about election matters. But as devices to limit the franchise to knowledgeable residents, the conclusive presumptions of durational residence requirements are much too crude. They exclude too many people who should not, and need not, be excluded. They represent a requirement of knowledge unfairly imposed on only some citizens. We are aware that classifications are always imprecise. By requiring classifications to be tailored to their purpose, we do not secretly require the impossible. Here, there is simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement that voters must have been residents in the State for a year and the county for three months. Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest.

III

Concluding that Tennessee has not offered an adequate justification for its durational residence laws, we affirm the judgment of the court below.

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, concurring in the result.

Professor Blumstein obviously could hardly wait to register to vote in his new home State of Tennessee. He arrived in Nashville on June 12, 1970. He moved into his apartment on June 19. He presented himself to the registrar on July 1. He instituted his lawsuit on July 17. Thus, his litigation was begun 35 days after his arrival on Tennessee soil, and less than 30 days after he moved into his apartment. But a primary was coming up on August 6. Usually, such zeal to exercise

the franchise is commendable. The professor, however, encountered—and, I assume, knowingly so—the barrier of the Tennessee durational residence requirement and, because he did, he instituted his test suit.

I have little quarrel with much of the content of the Court's long opinion. I concur in the result, with these few added comments, because I do not wish to be described on a later day as having taken a position broader than I think necessary for the disposition of this case.

1. In *Pope* v. *Williams*, 193 U. S. 621 (1904), Mr. Justice Peckham, in speaking for a unanimous Court that included the first Mr. Justice Harlan and Mr. Justice Holmes, said:

> "The simple matter to be herein determined is whether, with reference to the exercise of the privilege of voting in Maryland, the legislature of that State had the legal right to provide that a person coming into the State to reside should make the declaration of intent a year before he should have the right to be registered as a voter of the State.
>
> . . . . .
>
> ". . . The right of a State to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution.
>
> "The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, and this court has no concern with them." 193 U. S., at 632, 633–634.

I cannot so blithely explain *Pope* v. *Williams* away, as does the Court, *ante*, at 337 n. 7, by asserting that if that

opinion is "[c]arefully read," one sees that the case was concerned simply with a requirement that the new arrival declare his intention. The requirement was that he make the declaration *a year* before he registered to vote; time as well as intent was involved. For me, therefore, the Court today really overrules the holding in *Pope* v. *Williams* and does not restrict itself, as footnote 7 says, to rejecting what it says are mere dicta.

2. The compelling-state-interest test, as applied to a State's denial of the vote, seems to have come into full flower with *Kramer* v. *Union Free School District*, 395 U. S. 621, 627 (1969). The only supporting authority cited is in the "See" context to *Carrington* v. *Rash*, 380 U. S. 89, 96 (1965). But as I read *Carrington*, the standard there employed was that the voting requirements be reasonable. Indeed, in that opinion MR. JUSTICE STEWART observed, at 91, that the State has "unquestioned power to impose reasonable residence restrictions on the availability of the ballot." A like approach was taken in *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802, 809 (1969), where the Court referred to the necessity of "some rational relationship to a legitimate state end" and to a statute's being set aside "only if based on reasons totally unrelated to the pursuit of that goal." I mention this only to emphasize that *Kramer* appears to have elevated the standard. And this was only three years ago. Whether *Carrington* and *McDonald* are now frowned upon, at least in part, the Court does not say. Cf. *Bullock* v. *Carter*, *ante*, p. 134.

3. Clearly, for me, the State does have a profound interest in the purity of the ballot box and in an informed electorate and is entitled to take appropriate steps to assure those ends. Except where federal inter-

vention properly prescribes otherwise, see *Oregon* v. *Mitchell,* 400 U. S. 112 (1970), I see no constitutional imperative that voting requirements be the same in each State, or even that a State's time requirement relate to the 30-day measure imposed by Congress by 42 U. S. C. § 1973aa–1 (d) for presidential elections. I assume that the Court by its decision today does not depart from either of these propositions. I cannot be sure of this, however, for much of the opinion seems to be couched in absolute terms.

4. The Tennessee plan, based both in statute and in the State's constitution, is not ideal. I am content that the one-year and three-month requirements be struck down for want of something more closely related to the State's interest. It is, of course, a matter of line drawing, as the Court concedes, *ante,* at 348. But if 30 days pass constitutional muster, what of 35 or 45 or 75? The resolution of these longer measures, less than those today struck down, the Court leaves, I suspect, to the future.

MR. CHIEF JUSTICE BURGER, dissenting.

The holding of the Court in *Pope* v. *Williams,* 193 U. S. 621 (1904), is as valid today as it was at the turn of the century. It is no more a denial of equal protection for a State to require newcomers to be exposed to state and local problems for a reasonable period such as one year before voting, than it is to require children to wait 18 years before voting. Cf. *Oregon* v. *Mitchell,* 400 U. S. 112 (1970). In both cases some informed and responsible persons are denied the vote, while others less informed and less responsible are permitted to vote. Some lines must be drawn. To challenge such lines by the "compelling state interest" standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seem-

ingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.

The existence of a constitutional "right to travel" does not persuade me to the contrary. If the imposition of a durational residency requirement for voting abridges the right to travel, surely the imposition of an age qualification penalizes the young for being young, a status I assume the Constitution also protects.

Syllabus

FEIN *v.* SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7 OF YONKERS, NEW YORK, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 70–58. Argued October 12, 1971—Decided March 21, 1972

Following petitioner's classification as a conscientious objector by his local Selective Service Board, the State Director requested an appeal. Petitioner was notified but was not furnished with the basis for the appeal or given an opportunity to reply. The appeal board unanimously classified petitioner I–A and rejected his conscientious objector claim, without stating any reasons therefor. Petitioner was not entitled under the regulations to appeal to the national board, but the National Director, on petitioner's request, did note an appeal. The national board unanimously classified petitioner I–A, with no reasons given. There is no outstanding induction order for petitioner, who brought this pre-induction suit challenging, on due process grounds, the constitutionality of his Selective Service appeal procedures. The District Court dismissed the complaint, finding the suit barred by § 10 (b) (3) of the Military Selective Service Act of 1967, and the Court of Appeals affirmed. That section provides that a classification decision of the local board "shall be final, except where an appeal is authorized," and that the classification decision on appeal also "shall be final." It further provides that "[n]o judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction," and then the review "shall go to the question of the jurisdiction . . . only when there is no basis in fact for the classification." By statute enacted in September 1971, after petitioner's trial, a registrant is entitled to a personal appearance before a local or appeal board, and, on request, to a statement of reasons for any adverse decision. Ensuing changes in regulations, effective December 1971 and March 1972, provide the procedural features that petitioner complained were lacking. *Held:*

1. Section 10 (b) (3) forecloses pre-induction judicial review where the board has used its discretion and judgment in determining facts and arriving at a classification for the registrant. *Clark*

v. *Gabriel*, 393 U. S. 256, followed; *Oestereich* v. *Selective Service Board*, 393 U. S. 233, distinguished. In such case the registrant's judicial review is confined to situations where he asserts his defense in a criminal prosecution or where, after induction, he seeks a writ of habeas corpus. Pp. 372–377.

2. Petitioner's immediate induction is not assured, however, in light of the intervening statutory change, the new regulations thereunder, and a change in the Government's position, albeit in a post-induction case, to concede that some statement of reasons is necessary for "meaningful" review of the administrative decision when the registrant's claim has met the statutory criteria or has placed him prima facie within the statutory exemption. Pp. 377–381.

430 F. 2d 376, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN and WHITE, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 381. MARSHALL, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 387. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Michael B. Standard argued the cause for petitioner. With him on the briefs was *David Rosenberg*.

Solicitor General Griswold argued the cause for respondents. With him on the brief were *Assistant Attorney General Gray*, *Morton Hollander*, and *Robert E. Kopp*.

Melvin L. Wulf filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Petitioner Oliver T. Fein is a doctor of medicine. In February 1969 he filed this pre-induction suit in the United States District Court for the Southern District of New York. Jurisdiction was asserted under the federal-question statute, 28 U. S. C. § 1331, under the civil rights statute, 28 U. S. C. § 1343, and under the federal-officer statute, 28 U. S. C. § 1361. Fein challenged, on

due process grounds, the constitutionality of his Selective Service appeal procedures and sought declaratory and injunctive relief that would prevent his induction into military service. The defendants are Fein's local board at Yonkers, New York, the Appeal Board for the Southern District, the State Selective Service Director, and the National Appeal Board.

In an unreported memorandum decision, the District Court dismissed the complaint for want of jurisdiction. A divided panel of the Second Circuit affirmed. 430 F. 2d 376 (1970). Certiorari was granted, 401 U. S. 953 (1971), so that this Court might consider the important question whether § 10 (b)(3) of the Military Selective Service Act of 1967, 50 U. S. C. App. § 460 (b)(3),[1] permits this pre-induction challenge to Selective Service appeal procedures.

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[1] "The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. . . . The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title . . . and the determination of the President shall be final. No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant. . . ." 50 U. S. C. App. § 460 (b)(3).

Section 10 (b)(3) of the 1967 Act was amended by Pub. L. 92–129, § 101 (a)(26), 85 Stat. 351, approved Sept. 28, 1971. The amendment, however, did not change that portion of § 10 (b)(3) quoted above.

I

Fein, born May 5, 1940, registered with his Yonkers local board at age 18. He was assigned a II–S student deferment during his undergraduate years at Swarthmore College and, subsequently, during the period of his attendance at Case-Western Reserve University School of Medicine. Upon graduation from medical school, Fein was assigned a II–A occupational deferment because of his internship at Cleveland Metropolitan General Hospital.

In September 1967, while still an intern, Fein wrote his local board "to declare myself a conscientious objector to war and the institution which propagates war, the military." He requested and received SSS Form 150 for conscientious objectors. He promptly completed and returned the form to the local board.

In the form Fein stated: He believes in a Supreme Being. The beliefs from which his conscientious objection springs include the concepts that "human beings are primarily 'good,'" that this goodness "can only be realized, if human beings are allowed to fulfill their potential," and that "all human beings are fundamentally equal, in terms of their value as human beings." War violates "this essential being in all men . . . ." It "fosters irresponsibility for inhuman and cruel acts." It "demands a style of life, which is violent and hierarchical. It curbs and extinguishes rather than expands man's potential." The "substance of my beliefs stems from this common foundation of all religions. Thus my beliefs are not merely a personal moral code, but are ideals which emanate from centuries of religious tradition." He attributes the shaping of his beliefs to four principal sources: his parents, the church he formerly belonged to (a Lutheran body), the civil rights movement, and medicine. He believes "in the power

and values of moral and ethical force," but rejects "violent force" except perhaps in defense of self or of a loved one. His ideals were not articulated by age 18, but he began to formulate them at Swarthmore. Then followed a trip to the South; his break with his church; a summer in Germany where he learned of "biased American journalism about Cuba"; his helping organize a trip by students to Cuba; his interest in SNCC; his work in the slums of San Francisco; his settling in Cleveland's "Negro ghetto" during his first year at medical school; his then "full commitment to non-violence"; his contact with Students for a Democratic Society, which provided "a framework for working out my ideals about justice and equality"; and his "commitment to cooperative living and the poor community [which] stands as a mature expression of my beliefs."

Upon receiving Fein's Form 150 and letters supportive of his claim, the local board invited him to appear personally before it. He did so on November 15, 1967. After the interview the board denied him a I–O classification "at this time." Inasmuch as Fein then held his II–A classification, this action by the board was consistent with Selective Service Regulation 32 CFR § 1623.2 providing that a registrant be placed in the lowest class for which he is eligible.

In February 1968, however, Fein was reclassified I–A. He immediately asked for another personal appearance before the board. The request was granted and he appeared on May 27. The board then classified him as I–O and thus gave him his desired conscientious objector classification.

On June 4 the State Director, pursuant to 32 CFR § 1626.1, wrote the appeal board requesting an appeal and stating, "It is our opinion that the registrant would not qualify for a I–O classification as a conscientious objector." Notice of this was given Dr. Fein by mail.

Fein then wrote seeking "a statement indicating the basis for the State Director's appeal" and an opportunity to reply. No explanation was forthcoming.

The local board forwarded the file to the appeal board. Accompanying the file was a so-called "brief." This, as petitioner has conceded,[2] was merely a summary of the file prepared by a lay employee of the board. The appeal board, by a unanimous 4–0 vote on June 20, classified Dr. Fein I–A and thus rejected his claim to conscientious objector status. The board stated no reasons for its decision. Fein was notified of his reclassification.

Under 32 CFR § 1627.3 [3] a registrant was not entitled to take an appeal to the presidential, or national, appeal board from an adverse classification by the state appeal board made by a unanimous vote. Fein was in this position. Accordingly, he wrote the National Director of Selective Service in July and asked that the Director appeal on his behalf under 32 CFR § 1627.1 (a). Fein's letter to the Director was detailed. It emphasized his above-stated beliefs and the way of life to which those beliefs had guided him. "It should be clear, that I am willing to serve my country, but only in activities consistent with my conscience." Fein outlined the administrative proceedings and listed five claimed inequities: (1) the appeal board's rejection, upon the appeal by the State Director, of the local board's classification; (2) the failure of the Director to state the basis for his challenge; (3) the absence of an opportunity to submit supplemental information before the file was forwarded; (4) the absence of an opportunity to rebut the State Director's decision to take an appeal; and (5) the absence of an opportunity for a personal appearance before the appeal board.

[2] Tr. of Oral. Arg. 22.

[3] The provision is now 32 CFR § 1627.1 (b).

On July 31 Fein was ordered to report for induction September 6.

The National Director, however, complied with Fein's request and noted an appeal. Fein's outstanding induction order was canceled. He again asked the State Director for a statement of reasons. He was now advised that in the State Director's opinion he did not qualify for a Class I–O deferment and that the decision to appeal "was based upon the information contained in [his] selective service file."

On November 26, 1968, the national board, by a vote of 3–0, classified Dr. Fein I–A. No reason for this action was stated.

No new order that Fein report for induction has been issued.

Fein then instituted this suit. The complaint alleged that the statute and regulations governing Fein's classification and appeal violated the Due Process Clause of the Fifth Amendment in that they did not provide for a statement of reasons to the registrant for the State Director's decision to appeal, or for the appeal board's subsequent decision denying Fein a I–O classification. It also alleged that the defendants acted unconstitutionally by failing to provide Fein with the statements of reasons, by failing to permit him to submit additional material for consideration by the appeal boards, and by refusing him an opportunity to rebut the State Director's decision to appeal.

The District Court did not reach the merits of the constitutional claims. While expressing concern about Fein's ability to establish jurisdiction, the court assumed, *arguendo,* that he had done so, but then concluded that the suit was barred by § 10 (b)(3).

The Second Circuit affirmed, 430 F. 2d, at 377–380, relying, as did the District Court, upon *Oestereich* v. *Selective Service Board,* 393 U. S. 233 (1968); *Clark* v.

Gabriel, 393 U. S. 256 (1968); and *Boyd* v. *Clark*, 287 F. Supp. 561 (SDNY 1968), aff'd, 393 U. S. 316 (1969). One judge, in separate concurrence, 430 F. 2d, at 380, also thought that Fein had failed to establish the jurisdictional amount required under 28 U. S. C. § 1331. The third judge, citing the same cases as did the majority, dissented on the statutory issue; on the merits he would have ruled in Fein's favor. 430 F. 2d, at 380–388.

II

The case pivots, of course, upon the meaning and reach of § 10 (b)(3), and this Court's decisions in *Oestereich*, *Gabriel*, and *Boyd*, all *supra*, and in *Breen* v. *Selective Service Board*, 396 U. S. 460 (1970).

Section 10 (b)(3) states flatly that a classification decision of the local board "shall be final, except where an appeal is authorized . . ." and that the classification decision on appeal also "shall be final. . . ." It further provides, "No judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution . . . after the registrant has responded either affirmatively or negatively to an order to report for induction . . . ." Even then, the review "shall go to the question of the jurisdiction . . . only when there is no basis in fact for the classification . . . ."

The finality language appeared in conscription statutes prior to the 1967 Act. See Selective Draft Act of May 18, 1917, § 4, 40 Stat. 80; Selective Training and Service Act of 1940, § 10 (a)(2), 54 Stat. 893; and Selective Service Act of 1948, § 10 (b)(3), 62 Stat. 619. The Court construed this finality language, however, as indicating a congressional intent to restrict only the scope of judicial review and not to deprive the registrant of all access to the courts. See, for example, *Estep* v. *United States*, 327 U. S. 114 (1946), and *McKart* v.

United States, 395 U. S. 185 (1969). But judicial relief was confined to the "no basis in fact" situation. *Estep, supra,* at 122–123; *McKart, supra,* at 196.

The "except" clause and the "no basis in fact" language came into § 10 (b)(3) with the 1967 statute by way of prompt congressional reaction provoked by the Second Circuit's decision in *Wolff* v. *Selective Service Local Bd.,* 372 F. 2d 817 (1967). See H. R. Rep. No. 267, 90th Cong., 1st Sess., 30–31; 113 Cong. Rec. 15426.[4]

Section 10 (b)(3), as so amended, was promptly challenged. In *Oestereich* the Court refrained from striking down the statute on constitutional grounds. It held, however, that pre-induction judicial review was available to that petitioner who, as a divinity student, claimed his local board had wrongfully denied him a statutory exemption from military service. To rule otherwise "is to construe the Act with unnecessary harshness." And, "No one, we believe, suggests that § 10 (b)(3) can sustain a literal reading." This construction, it was said, leaves the section "unimpaired in the normal operations of the Act." 393 U. S., at 238. See *Gutknecht* v. *United States,* 396 U. S. 295, 303 (1970), where reference was made to the "unusual circumstances" of *Oestereich.*

In the companion *Gabriel* case, on the other hand, the registrant was asserting a conscientious objector claim. The Court said:

> "Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a de-

[4] S. Rep. No. 209, 90th Cong., 1st Sess., 10, contained the observation that a registrant may also challenge his classification by post-induction habeas corpus. See *Witmer* v. *United States,* 348 U. S. 375, 377 (1955).

> termination of fact and an exercise of judgment. . . . To allow pre-induction judicial review of such determinations would be to permit precisely the kind of 'litigious interruptions of procedures to provide necessary military manpower' (113 Cong. Rec. 15426 (report by Senator Russell on Conference Committee action)) which Congress sought to prevent when it enacted § 10 (b)(3)." 393 U. S., at 258–259.

The constitutionality of the statute again was upheld. *Id.*, at 259. MR. JUSTICE DOUGLAS, separately concurring, noted hypothetical fact situations as to which he might take a different view and then observed:

> "But in my view it takes the extreme case where the Board can be said to flout the law, as it did in *Oestereich* v. *Selective Service Bd.*, [393 U. S. 233], to warrant pre-induction review of its actions." 393 U. S., at 260.

Oestereich was complemented by *Breen* a year later with respect to a registrant statutorily entitled to a deferment rather than to an exemption. See also *Kolden* v. *Selective Service Board*, 397 U. S. 47 (1970).

Finally, pre-induction review was denied under § 10 (b)(3) in *Boyd* v. *Clark*, 287 F. Supp. 561 (SDNY 1968), a decision affirmed here, 393 U. S. 316 (1969), with only a single reference to *Gabriel*, decided just four weeks before. In *Boyd*, four registrants, each classified I–A, challenged student deferment on the ground that it discriminated against those financially unable to attend college. They did not otherwise contest their own I–A classifications.

Thus *Oestereich*, *Gabriel*, *Breen*, and *Boyd* together establish the principles (a) that § 10 (b)(3) does not foreclose pre-induction judicial review in that rather rare instance where administrative action, based on reasons unrelated to the merits of the claim to exemption or

deferment, deprives the registrant of the classification to which, otherwise and concededly, he is entitled by statute, and (b) that § 10 (b)(3) does foreclose pre-induction judicial review in the more common situation where the board, authoritatively, has used its discretion and judgment in determining facts and in arriving at a classification for the registrant. In the latter case the registrant's judicial review is confined—and constitutionally so—to the situations where he asserts his defense in a criminal prosecution or where, after induction, he seeks a writ of habeas corpus. By these cases the Court accommodated constitutional commands with the several provisions of the Military Selective Service Act and the expressed congressional intent to prevent litigious interruption of the Selective Service process.

III

These principles do not automatically decide Fein's case. The doctor, unlike Oestereich and unlike Breen, cannot and does not claim a statutory exemption or a statutory deferment on the basis of objectively established and conceded status. On the other hand, while *Gabriel* focuses on the administrative and discretionary process, it does not necessarily foreclose Fein's claim. This is so because Fein challenges the constitutionality of the very administrative procedures by which, he claims, the presentation of his case was adversely affected.

This was the aspect of the *Oestereich* and *Breen* decisions that concerned Mr. Justice Harlan. 393 U. S., at 239; 396 U. S., at 468–469. He would have allowed pre-induction judicial review of a procedural challenge on constitutional grounds if it presented no "opportunity for protracted delay" in the system's operations, and if the issue was beyond the competence of the board to hear and determine. This view, however, commanded the vote of no other member of the Court.

We again conclude that the line drawn by the Court between *Oestereich* and *Breen*, on the one hand, and *Gabriel* and, inferentially, *Boyd*, on the other, is the appropriate place at which, in the face of the bar of § 10 (b)(3), to distinguish between availability and unavailability of pre-induction review. We therefore adhere to the principles established by those cases.

We further conclude that, as measured against the facts of Fein's case, it is *Gabriel*, and not *Oestereich* and *Breen*, that is controlling. Unlike the registrants in *Oestereich* and *Breen*, Fein's claimed status is not one that was factually conceded and thus was assured by the statute upon objective criteria. His administrative classification action was, in contrast, a product of the "process" and the "system of classification," as the petitioner stressed at oral argument.[5] It turned "on the weight and credibility of the testimony," as MR. JUSTICE DOUGLAS noted in his concurrence in *Gabriel*, 393 U. S., at 259. And it was "dependent upon an act of judgment by the Board." *Gabriel*, 393 U. S., at 258.

The case strikes us, as did *Gabriel*, as representative of a category that, if allowed pre-induction review, would tend to promote the "litigious interruptions of procedures to provide necessary military manpower" that Congress intended to prevent. 113 Cong. Rec. 15426. The conscientious objector claim is one ideally fit for administrative determination.

We are not persuaded, as has been suggested,[6] that the local board's grant of the I–O classification equates with the conceded exemption and deferment involved in *Oestereich* and *Breen*. Objective certainty of status is lacking; in addition, the respective rulings of the two appeal boards were themselves based on an evaluation of the same file and yet were opposite to that of the

[5] Tr. of Oral Arg. 13, 18.

[6] *Id.*, at 16–18.

local board. It is true that in *Oestereich* and *Breen* a result favorable to the registrant was also reversed, but there the change came about only by the board's consideration of extraneous circumstances apart from the merits of the underlying claims.

Finally, we find no merit in the petitioner's argument, apparently asserted for the first time in this Court, that a local board's determination, on a conscientious objector claim, favorable to the registrant is not amenable to the appeal procedures prescribed by the Act. Section 10 (b) (3), by its terms, makes a board's decision final subject to appeal and we see no confinement of that right of appeal to the registrant alone so as to nullify the regulations' express grant of appellate power to the State Director as well as to the registrant. The statute, furthermore, is specific as to the President's right to review.

The conclusion we have reached makes it unnecessary to consider in any detail the propositions, urged by the respondents, that the petitioner has not demonstrated the presence of the jurisdictional amount required under 28 U. S. C. § 1331, and that his arguments are premature because he is presently not the subject of an outstanding induction order.

IV

All this does not mean, however, that this decision assures Dr. Fein's immediate induction into military service. Events since the inception and trial of the case indicate otherwise:

A. *The 1971 Statute.* By Pub. L. 92–129, § 101 (a) (36), 85 Stat. 353, approved September 28, 1971, the following new section, 50 U. S. C. App. § 471a (1970 ed. Supp. I), was added to the 1967 Act, now renamed the Military Selective Service Act:

> "Procedural Rights
>
> "SEC. 22. (a) It is hereby declared to be the purpose of this section to guarantee to each regis-

trant asserting a claim before a local or appeal board, a fair hearing consistent with the informal and expeditious processing which is required by selective service cases.

"(b) Pursuant to such rules and regulations as the President may prescribe—

"(1) Each registrant shall be afforded the opportunity to appear in person before the local or any appeal board of the Selective Service System to testify and present evidence regarding his status.

. . . . .

"(4) In the event of a decision adverse to the claim of a registrant, the local or appeal board making such decision shall, upon request, furnish to such registrant a brief written statement of the reasons for its decision."

A registrant thus is now statutorily entitled to a personal appearance before a local or appeal board and, on request, to a statement of reasons for any decision of the board adverse to him. This 1971 addition to the statute does not, by its terms, purport to be retroactive.

B. *The Emerging Regulations.* In implementation of the new statute, the administrative regulations have been undergoing change. Some amendments were promulgated effective December 10, 1971. 36 Fed. Reg. 23374–23385. Others were promulgated effective March 11, 1972. 37 Fed. Reg. 5120–5127. From these it appears that all, or nearly all, the procedural features about which Dr. Fein complains in the present case have been changed administratively. Specifically: (1) When an appeal is taken by the State Director "he shall place in the registrant's file a written statement of his reasons for taking such appeal." The local board shall notify the registrant in writing of the action and the reasons therefor, and advise him that the registrant may re-

quest a personal appearance before the appeal board. §§ 1626.3 (a) and (b). (2) At such personal appearance the registrant may present evidence, discuss his classification, point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file that he believes the local board has overlooked or to which it has given insufficient weight. He may present such further information as he believes will assist the board. The registrant, however, may not be represented before an appeal board by anyone acting as attorney and he shall not be entitled to present witnesses. §§ 1624.4 (e) and (d). (3) If the appeal board classifies the registrant in a class other than the one he requested, it shall record its reasons therefor in his file. The local board shall inform the registrant of such reasons in writing at the time it mails his notice of classification. § 1626.4 (i). (4) On the director's appeal to the national board the registrant may request an appearance. § 1627.3 (d). At that appearance the registrant may present evidence, other than witnesses, bearing on his classification. There, too, he may discuss his classification, point out the class or classes in which he thinks he should have been placed, and direct attention to any information in his file that he believes the local board overlooked or to which it has given insufficient weight. He may also present such further information as he believes will assist the national board in determining his proper classification. §§ 1627.4 (c) and (e). (5) If the national board classifies the registrant in a class other than the one he requested it shall record its reasons therefor in his file and on request by the registrant it shall furnish him a brief statement of the reasons for its decision. § 1627.4 (h).

Thus, under present procedure effective in part since December 10, 1971, and in part since March 11, 1972,

complaints about one's inability to appear before appeal boards, about not being given reasons for adverse classifications, and about inability to present additional material at the appellate stages are all alleviated and, indeed, eliminated.

C. *The Change in the Government's Position.* In their brief filed prior to the adoption of the 1971 Act, the respondents acknowledged the appearance of "a relatively recent line of authority" exemplified by *United States* v. *Haughton*, 413 F. 2d 736 (CA9 1969), to the effect that the failure of a local board to articulate in writing the reason for its denial of a conscientious objector classification is a fatal procedural flaw when the registrant has made a prima facie case for such status.[7] Brief 52–53. The rationale is that some statement of reasons is necessary for "meaningful" review [8] of the administrative decision when the registrant's claim has met the statutory criteria or has placed him prima facie within the statutory exemption, and his veracity is the principal issue.

The respondents appropriately noted, however, that these decisions were all so-called post-induction cases in the sense that they were appeals from convictions under § 12 (a), 50 U. S. C. App. § 462 (a). The respondents accordingly took the position that this line of authority, however appropriate it might be for post-induction review, did not support or justify an exception

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[7] See also *United States* v. *Edwards*, 450 F. 2d 49 (CA1 1971); *United States* v. *Lenhard*, 437 F. 2d 936 (CA2 1970); *Scott* v. *Commanding Officer*, 431 F. 2d 1132 (CA3 1970); *United States* v. *Broyles*, 423 F. 2d 1299 (CA4 1970); *United States* v. *Stetter*, 445 F. 2d 472 (CA5 1971); *United States* v. *Washington*, 392 F. 2d 37 (CA6 1968); *United States* v. *Lemmens*, 430 F. 2d 619 (CA7 1970); *United States* v. *Cummins*, 425 F. 2d 646 (CA8 1970); *United States* v. *Pacheco*, 433 F. 2d 914 (CA10 1970).

[8] See *Gonzales* v. *United States*, 348 U. S. 407, 415 (1955).

to the bar of § 10 (b)(3) against pre-induction review of the processing or classifying of registrants.

In a memorandum filed here since the 1971 Act in No. 70–251, *Joseph* v. *United States,* cert. granted, 404 U. S. 820 (1971), the Government has now taken the position that "[a]lthough this judicial rule [of *Haughton* and its progeny] finds little support in early precedent . . . we do not think it appropriate to contend that it is erroneous." The Government also notes that the requirement for an administrative statement of reasons "seems fully consistent with the new statutory . . . and regulatory . . . provisions on this point." Memo 13, 14.

While *Joseph* also is a conviction case and is not one on pre-induction review, its obvious significance for Fein is that if the doctor is ever again called for induction, the rule of *Haughton* will provide a defense for him unless and until the requirements of the new statute and regulations are fulfilled. Whether this necessitates a complete reprocessing of Fein's case is a matter we leave in the first instance to the administrative authorities.

The judgment of the Court of Appeals is therefore to be affirmed. We express no view upon the merits of Dr. Fein's conscientious objector claim other than to observe the obvious, namely, that his claim is not frivolous.

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

I

Today the Court approves a construction of § 10 (b)(3) of the Military Selective Service Act of 1967, 50

U. S. C. App. § 460 (b)(3),[1] which raises serious questions of procedural due process. Doctor Fein was classified as a conscientious objector by his local board. The State Director appealed, but gave no reason for this extraordinary action.[2] The appeal board then reclassified Dr. Fein I–A. It, too, gave no reasons.

We explained the nature of the "hearing" required by the Due Process Clause of the Fifth Amendment in *Morgan* v. *United States*, 304 U. S. 1, 18–19:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

See *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313; *Jenkins* v. *McKeithen*, 395 U. S. 411; *Greene*

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[1] Section 10 (b)(3) reads in pertinent part as follows:

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

[2] Except the somewhat cryptic statement that "[i]t is our opinion that the registrant would not qualify for a I–O classification as a conscientious objector."

v. *McElroy*, 360 U. S. 474, 493; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 368–369.

Morgan involved property rights—rates for stockyard services. But the Due Process Clause protects "life" and "liberty" as well as "property." See *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 596–598. If a man, contrary to his scruples, is forced to go overseas to battle, he is deprived of his "liberty," if not his "life."

When administrative orders deprive a person of property without a full and fair opportunity to object, this Court has been most reluctant to defer judicial review until after those orders have taken effect. See *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152–153; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463; *Londoner* v. *City & County of Denver*, 210 U. S. 373, 385. Judicial scrutiny has been particularly close where, as here, review is conditioned upon submitting to the risk of substantial penalties should the order prove to have been validly made. See *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331; *Ex parte Young*, 209 U. S. 123. Cf. *Reisman* v. *Caplin*, 375 U. S. 440, 446–450. We should require no less when personal liberty is at stake.[3]

How can we possibly affirm the judgment below in light of the constitutional dimension of the problem? As respects his claim to "liberty," is Fein to be relegated to the procedures of a criminal prosecution when Congress was meticulous to provide for its resolution in the administrative process? No such downgrading of rights

[3] Some courts, however, have been more zealous in their exaltation of property rights than they have of constitutionally safeguarded individual liberties. See, *e. g.*, *Poole* v. *State*, 244 Ark. 1222, 1225, 428 S. W. 2d 628, 630:

"The right of an individual to acquire and possess and protect property is inherent and inalienable and declared higher than any constitutional sanction in Arkansas . . . ."

would be tolerated in a "property" case; why are we less mindful of the requirements of due process when a man's "liberty" is at stake?

II

Section 10 (b)(3) purports to defer judicial review of Selective Service System classification decisions to the defense of a criminal prosecution for failure to report for induction. It represents a congressional response to the concern that widespread pre-induction review of Selective Service classification decisions would seriously impede the ability of the System to process manpower for the Armed Forces. See remarks of Senator Russell, 113 Cong. Rec. 15426. We held in *Oestereich* v. *Selective Service Board,* 393 U. S. 233, however, that the statute cannot be read literally. "For while it purports on its face to suspend the writ of habeas corpus as a vehicle for reviewing a criminal conviction under the Act, everyone agrees that such was not its intent." *Id.,* at 238. We held that it must be interpreted to permit pre-induction review in that exceptional class of cases involving "a clear departure by the Board from its statutory mandate." 393 U. S., at 238. Because Ostereich's local board had employed unauthorized and "lawless" procedures to deprive him of an exemption to which he was entitled by statute, we further held that § 10 (b)(3) was no bar to the suit. See also *Breen* v. *Selective Service Board,* 396 U. S. 460.

The courts below, relying on *Clark* v. *Gabriel,* 393 U. S. 256, held that, unlike the ministerial exemption (IV–D) at issue in *Oestereich* and the student deferment (II–S) in *Breen,* the conscientious objector exemption (I–O) is committed to the discretion of the board, and contemplates the complex evidentiary and factual determinations which § 10 (b)(3) primarily intended to insulate from pre-induction review. Were Fein com-

plaining that his appeal board had no basis in fact to discontinue his conscientious objector exemption, this distinction would be significant.

The fact that Fein was classified I–O by his local board (rather than IV–D or II–S) before being stripped of his exemption does not, however, distinguish his case from *Oestereich.* Indeed, it is *Clark* v. *Gabriel, supra,* on which the majority and lower court placed such heavy reliance for the opposite proposition, that demonstrates the applicability of *Oestereich* to the present situation.

Gabriel's conscientious objector claim had been rejected by his local board, after "evaluating evidence and . . . determining whether a claimed exemption is deserved." *Oestereich, supra,* at 238. His basic argument was that there was no basis in fact to deny him his exemption. As the Court said, however, there was

> "no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. *By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being 'sustained by the local board.'*" 393 U. S., at 258 (emphasis supplied).

But Fein's claim, unlike that of Gabriel, *has* been "sustained by the local board." Thus, by statute, it is mandatory that the exemption be awarded him—subject, of course, to subsequent action in accordance with lawful, authorized procedures. But this is the situation which obtained in *Oestereich.* The exemption at issue in that case could also have been removed in accord with lawful procedures. The crucial similarity is that both Oestereich and Fein have met the preliminary hurdle of demonstrating to the local board their statutory fitness for a given exemption.

The nature of Dr. Fein's claim is that the Selective Service System has been "blatantly lawless," not in taking away his exemption *per se*, but in doing so in a manner which violates the mandate of § 1 (c) of the Act, 50 U. S. C. App. § 451 (c), that the system be administered in a way "which is fair and just . . . ."

It should by now be undisputed that an essential of a "fair and just" procedure is the registrant's right to be heard by the agency in the system that deprives him of his liberty.[4] To be meaningful, that hearing must include the right to appear, and to be apprised of and given a chance to reply to adverse information contained in one's file. Dr. Fein was afforded none of these rights. The regulations did not permit a personal appearance before the appeal board. Dr. Fein was not informed of the reasons for the appeal. He had no right to submit a statement of his own, as the State Director, the person appealing, had not submitted a statement. 32 CFR § 1626.12. Dr. Fein never even received a statement of reasons for the appeal board's reclassification, a defalcation which the Solicitor General has conceded to be error in a similar context. Memorandum for the United States, *Joseph* v. *United States*, No. 70–251. See also Memorandum for the United States, *Lenhard* v. *United States*, No. 71–5840.

Like Oestereich's, therefore, Fein's complaint is "unrelated to the merits of granting or continuing that exemption," 393 U. S., at 237. It is instead a challenge to the

[4] See, *e. g.*, *Clay* v. *United States*, 403 U. S. 698; *Mulloy* v. *United States*, 398 U. S. 410, 416; *Gonzales* v. *United States*, 348 U. S. 407, 417; *Simmons* v. *United States*, 348 U. S. 397, 405. See also *Greene* v. *McElroy*, 360 U. S. 474, 493; *Morgan* v. *United States*, 304 U. S. 1, 18–19; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 368–369; *United States* v. *Thompson*, 431 F. 2d 1265, 1271; *United States* v. *Cabbage*, 430 F. 2d 1037, 1039–1041; *United States* v. *Cummins*, 425 F. 2d 646; *United States* v. *Owen*, 415 F. 2d 383, 388–389; *Wiener* v. *Local Bd. No. 4*, 302 F. Supp. 266, 270.

basic fairness of the administrative process itself. And, while Fein himself characterizes his attack as a "constitutional" one, the procedural guarantees which he says were denied him are implicit in the Act itself. It is as unlawful to employ the regulations governing the appeal procedure to deny fundamental procedural rights implicit in the statutory scheme as it was in *Oestereich* and *Breen* to use the regulations governing delinquency to work a similar deprivation.

The literalness with which the Court treats Dr. Fein's claim "does violence to the clear mandate of" § 1 (c) of the Act, and misconstrues the thrust of *Oestereich, Gabriel,* and *Breen.* Fein's claim presents a clear case for pre-induction review. As in *Oestereich,* we have here a case where the Selective Service System is itself "basically lawless." On the admittedly extraordinary facts of this case, Fein has been effectively deprived of the entire panoply of appellate remedies guaranteed to him by the Act, and put in a position wherein meaningful judicial review of the underlying classification decision has become a virtual impossibility.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART joins, dissenting.

I dissent. Today's holding reinterprets *Oestereich* v. *Selective Service Board,* 393 U. S. 233 (1968), to establish a principle that serves no sensible purpose. If *Oestereich* is to be preserved, it must be rooted in a principle that permits pre-induction review in this case as well.

As the majority correctly observes, our decision in *Oestereich* foreclosed any further argument that § 10 (b) (3) constitutes an absolute bar to pre-induction judicial review. "No one, we believe, suggests that § 10 (b) (3) can sustain a literal reading." *Id.,* at 238. Having thus adopted in *Oestereich,* and reaffirmed in

Breen v. *Selective Service Board,* 396 U. S. 460 (1970), an interpretation of the Act that permits pre-induction review in some cases, we need decide today only whether Dr. Fein raises that sort of exceptional claim appropriate for pre-induction review.

The majority apparently holds that pre-induction review is available only where a registrant's "claimed status is . . . factually conceded and thus [is] assured by the statute upon objective criteria." *Ante,* at 376. I confess that I do not altogether understand these key words in the majority's test. But I fathom enough to conclude that the test makes little sense. Although petitioner challenges only the procedures used by the Selective Service System, and does not ask this Court to decide the merits of his conscientious objector (CO) claim, he loses his lawsuit because his entitlement to a CO classification is not "factually conceded" or "objectively certain." But the merits of petitioner's CO claim are not at issue in this pre-induction litigation. I can think of no reasons for an approach that ignores the actual pre-induction claim, and that permits pre-induction review only where "objective certainty of [the registrant's] status" exists. *Ibid. Oestereich* should not be recast this narrowly.

The majority says that there can be pre-induction review only when the registrant's status is assured "upon objective criteria." This, by itself, might only mean that where status turns on unconceded factual claims—as opposed to more "objectively" determined legal claims—pre-induction review is barred. But the heart of the majority's test is that pre-induction review is permitted only when there is "objective *certainty*" of status. Obviously, this approach is not immediately suggested by the words of § 10 (b)(3), which proscribes pre-induction review "of the classification or processing of any registrant." Nor does it avoid the "unnecessary

harshness" that the majority concedes *Oestereich* sought to prevent. Where the registrant's status is "objectively certain," or where the Government concedes that it will not prosecute the registrant if he refuses induction and will confess error if he submits to induction and brings a habeas corpus action, the registrant is "least jeopardized by the procedural limitations of § 10 (b)(3)." *Oestereich* v. *Selective Service Board,* 393 U. S., at 251 (STEWART, J., dissenting). Where there is no pre-induction review, the harsher burden falls on the registrant whose rights and ultimate status are not free from doubt or conceded. He is the one faced with the enormous uncertainties of a criminal prosecution for refusing induction; and should he submit to what he thinks is an illegal induction, anticipating relief through habeas corpus, his uncertain prospects make it unlikely that he could avoid the massive dislocations of induction itself (*e. g.,* giving up a job, leaving school). In short, the majority's theory of pre-induction review helps the wrong people.[1]

A viable approach to the problem of pre-induction review is to be found by comparing *Oestereich* with the other § 10 (b)(3) case decided on the same day, *Clark* v. *Gabriel,* 393 U. S. 256 (1968). In *Clark* v. *Gabriel,* we interpreted § 10 (b)(3) to bar pre-induction review where the challenged action "inescapably involves a de-

[1] The cases in which the majority would permit pre-induction review are not those in which Selective Service manpower gathering processes are "interrupted" to a distinctively minimal extent. "Litigious interruption" comes from the ordinary processes of any litigation, the delays built in the Federal Rules. These interruptive time delays are not significantly shortened in lawsuits where the Government makes crucial concessions at the appeal stage (as in *Oestereich*), or where the pertinent determination is whether a registrant's status is "objectively certain." A day or two of court time may be saved, but, given the duration of the entire litigation, this is insignificant.

termination of fact and an exercise of judgment"; thus, we refused to allow pre-induction review where the registrant claimed, on the facts, that he was entitled to a CO classification. However, we permitted pre-induction review in *Oestereich, supra,* where the local board's action, taken pursuant to a purportedly valid disciplinary regulation, was in claimed conflict with rights to exemption assured by statute. Cf. *Breen* v. *Selective Service Board, supra.*[2] For reasons that will become clearer below, the crucial difference for me between the cases is that in *Oestereich* (and *Breen*) the registrant challenged a purportedly valid Selective Service rule of general application, the validity of which the administrative process could not competently adjudicate before induction.

At issue in Dr. Fein's case are Selective Service appeal procedures, general rules that are said to be invalid under the Constitution. At stake is not a board determination "processing or classifying" an individual registrant,[3] but general procedures prescribing the way such determinations are made. The situation here is substantially similar to *Oestereich,* and altogether different from the one in *Clark* v. *Gabriel.* In *Oestereich,* as former Chief Judge Lumbard noted in dissent below,

> "[T]he registrant challenge[d] a procedure unauthorized by statute, while claiming that the regula-

[2] The majority relies on *Boyd* v. *Clark,* 287 F. Supp. 561 (SDNY 1968), which we summarily affirmed, 393 U. S. 316 (1969), with a single citation of *Clark* v. *Gabriel,* 393 U. S. 256 (1968). Although the District Court dismissed the lawsuit on two grounds—that pre-induction review was improper and that the jurisdictional amount requirement had not been met—we affirmed on the single ground that pre-induction review was improper, as our simple reference to *Clark* v. *Gabriel* was designed to indicate. That reference should not be overburdened with significance. Since those registrants, who had *never* received an induction notice, had not reached a position of finality within the system, pre-induction review was inappropriate.

[3] Section 10 (b) (3) proscribes pre-induction review "of the classification or processing of any registrant . . . ."

> tion deprive[d] him of a right based on higher authority. The difference, which I do not deem significant, is that in *Oestereich* the conflict posed was between a [Selective Service] regulation—the delinquency provision—and a statutory command, the ministerial exemption." 430 F. 2d 376, 382 (1970).

Here, Selective Service appellate procedures, implemented under Selective Service regulations 32 CFR § 1626 *et seq.*, arguably conflict with the *constitutional* requirements of the Due Process Clause, "surely an a fortiori case for preinduction review." *Ibid.* In *Oestereich, Breen,* and this case, the Selective Service System relied on rules, purportedly valid, that are challenged as illegal in their general application.

In *Clark* v. *Gabriel,* the registrant challenged the factual and judgmental determination that he was not entitled to a conscientious objector classification. But Dr. Fein does not challenge that individualized judgment in his pre-induction suit. Here, the registrant's local board found him entitled to a CO classification, and then this presumptively correct classification was taken away pursuant to allegedly lawless and unconstitutional procedures.[4] The facial validity of these procedures is the only issue here. In neither *Oestereich, Breen,* nor this case would pre-induction inquiry look to discretionary determinations of the System, or to factual judgments of the local or appeal board. (Nor is there any dispute in

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[4] The majority notes:

"It is true that in *Oestereich* and *Breen* a result favorable to the registrant was also reversed, but there the change came about only by the board's consideration of extraneous circumstances apart from the merits of the underlying claims." *Ante,* at 377.

This distinction is indeed ironic. One of Fein's basic claims in this lawsuit is that absent a statement of reasons by the Appeal Board that took away his CO classification, there is no way of knowing whether that action was based on extraneous circumstances or whether it was lawful.

our case that the challenged procedures were actually followed here.)

In my view, pre-induction judicial review should be permitted where the registrant claims that generally applied rules administered by Selective Service are invalid, and where the administrative process is not competent to decide the registrant's claim. Unlike the approach of the majority, this approach would benefit an appropriate group of registrants, without doing violence to Congress' apparent purposes in passing § 10 (b) (3). While the majority opinion in *Oestereich* was directed narrowly to the facts there presented, the decision may fairly be said to recognize that § 10 (b)(3) was intended to be an integral part of the complex machinery designed by Congress to raise an army fairly and expeditiously. In my view, § 10 (b)(3) reflected two related assumptions of Congress. First, Congress assumed procedural regularity in the administrative system. Where the general administrative procedures are valid—where procedural regularity is acknowledged—individual "classification or processing" determinations may be presumed correct, and pre-induction review would be an unwarranted interference with an orderly induction system. More generally, as I view § 10 (b)(3), Congress wanted to make clear that since it had provided an elaborate administrative procedure in which registrants have a full opportunity to raise their claims, they should not be allowed to have duplicative judicial review of the administrative determinations before induction. These premises justifying a ban on pre-induction review may be undercut in particular cases, and in such cases pre-induction review should be permitted. Where, as in Dr. Fein's case, the underlying procedures of the classification system are themselves challenged—where Congress' presumption of procedural regularity is called into question—pre-induc-

tion review should be permitted. And where, as here, a registrant makes a claim not suited for administrative determination even in the first instance, pre-induction judicial review would not duplicate the administrative process and therefore should be permitted. Of course, where the correctness of a particular classification is at issue, the administrative process usually has an opportunity to decide whether the claimed error exists, and pre-induction review would be inappropriate. But a Selective Service Board of laymen does not have the competence to decide Dr. Fein's claim that generally applied Selective Service procedures are unconstitutional. Without pre-induction judicial review, Dr. Fein's liberty is taken without *any* competent body deciding the constitutional question he raises. Cf. *Oestereich* v. *Selective Service Board, supra,* at 243 (Harlan, J., concurring in result). Section 10 (b)(3) does not require such a harsh result, at odds with the spirit, if not the letter, of so many of our constitutional decisions.

I would permit pre-induction review in this case, and would remand for consideration of the merits of petitioner's claims.

COMMISSIONER OF INTERNAL REVENUE *v.* FIRST SECURITY BANK OF UTAH, N. A., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 70–305. Argued January 10, 1972—Decided March 21, 1972

Respondent banks were subsidiaries of a holding company that also controlled a management company, an insurance agency, and, from 1954, an insurance company (Security Life). In 1948 the banks began to offer to arrange credit life insurance for their borrowers, placing the insurance with an independent insurance carrier. National banking laws were deemed to prohibit the banks from receiving sales commissions, which were paid by the carrier to the insurance agency subsidiary. The commissions were reported as taxable income for the 1948–1954 period by the management company. After 1954, when Security Life was organized, the credit life insurance on the banks' customers was placed with an independent carrier, which reinsured the risks with Security Life, the latter retaining 85% of the premiums. No sales commissions were paid. Security Life reported all the reinsurance premiums on its income tax returns for the period 1955 to 1959, at the preferential tax rate for insurance companies. Petitioner, pursuant to 26 U. S. C. § 482, granting him power to allocate gross income among controlled corporations in order to reflect the actual incomes of the corporations, determined that 40% of Security Life's premium income was allocable to the banks as commission income earned for originating and processing the credit life insurance. The Tax Court affirmed petitioner's action, but the Court of Appeals reversed. *Held:* Since the banks did not receive and were prohibited by law from receiving sales commissions, no part of the reinsurance premium income could be attributed to them, and petitioner's exercise of the § 482 authority was not warranted. Pp. 403–407.

436 F. 2d 1192, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 407. BLACKMUN, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 418.

Ernest J. Brown argued the cause for petitioner. On the brief were *Solicitor General Griswold, Acting Assistant Attorney General Ugast, Matthew J. Zinn,* and *Bennet N. Hollander.*

Stephen H. Anderson argued the cause for respondents. With him on the brief was *S. J. Quinney.*

Ernest Getz filed a brief for Bud Kouts Chevrolet Co. et al. as *amici curiae* urging affirmance.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents for review a determination by the Commissioner of Internal Revenue (Commissioner), pursuant to § 482 of the Internal Revenue Act,[1] that the income of taxpayers within a controlled group should be reallocated to reflect the true taxable income of each. Deficiencies were assessed against respondents. The Tax Court affirmed the Commissioner's action, and respondents appealed to the Court of Appeals for the Tenth Circuit. That court reversed the decision of the Tax Court, 436 F. 2d 1192 (1971), and we granted the Commissioner's petition for certiorari to resolve a conflict between the decision below and that in *Local Finance Corp.* v. *Commissioner,* 407 F. 2d 629 (CA7), cert. denied, 396 U. S. 956 (1969). We now affirm the decision of the Court of Appeals.

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[1] Title 26 U. S. C. § 482 provides:

"In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary or his delegate may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses."

Respondents, First Security Bank of Utah, N. A., and First Security Bank of Idaho, N. A. (the Banks), are national banks that, during the tax years, were wholly owned subsidiaries of First Security Corp. (Holding Company). Other, non-bank, subsidiaries of the Holding Company, relevant to this case, were First Security Co. (Management Company), Ed. D. Smith & Sons, an insurance agency (Smith), and—from June 1954—First Security Life Insurance Company of Texas (Security Life). Beginning in 1948, the Banks offered to arrange for borrowers credit life, health, and accident insurance (credit life insurance). The Tax Court found that they did this "for several reasons," including (1) offering a service increasingly supplied by competing financial institutions, (2) obtaining the benefit of the additional collateral that credit insurance provides by repaying loans upon the death, injury, or illness of the borrower, and (3) providing an "additional source of income—part of the premiums from the insurance—to Holding Company or its subsidiaries."

Until 1954, any borrower who elected to purchase this insurance was referred by the Banks to two independent insurance companies. The premium rate charged was $1 per $100 of coverage per year, the rate commonly charged in the industry. The Insurance Commissioners of the States involved—Utah, Idaho, and Texas—accepted this rate. The Banks followed a routine procedure in making this insurance available to customers. The lending officer would explain the function and availability of credit insurance. If the customer desired the coverage, the necessary form was completed, a certificate of insurance was delivered, and the premium was collected or added to the customer's loan. The Banks then forwarded the completed forms and premiums to Management Company, which maintained records of the

insurance purchased and forwarded the premiums to the insurance carrier. Management Company also processed claims filed under the policies. The cost to each of the Banks for the actual time devoted to explaining and processing the insurance was less than $2,000 per year, characterized by the courts below as "negligible." The cost to Management Company of the services rendered by it was also negligible, slightly in excess of $2,000 per year.

It was the custom in the insurance business (although not invariably followed), regardless of the cost of incidental paperwork, to pay a "sales commission"—ranging from 40% to 55% of net premiums collected—to a party who originated or generated the business. But the Banks had been advised by counsel that they could not lawfully conduct the business of an insurance agency or receive income resulting from their customers' purchase of credit life insurance. Neither the Banks nor any of their officers were licensed to sell insurance, and there is no question here of unlawfully acting as unlicensed agents. The Banks received no commissions or other income on or with respect to the credit insurance generated by them. During the period from 1948 to 1954 commissions were paid by the independent companies writing the insurance directly, to Smith, one of the wholly owned subsidiaries of Holding Company. These commissions were reported as taxable income, not by Smith, but by Management Company which had rendered the services above described. During this period (1948–1954), the Commissioner did not attempt to allocate the commissions to the Banks.[2]

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[2] The corporate income tax imposes the same rate of taxation on taxable income up to $25,000 and the same rate for income greater than $25,000. 26 U. S. C. § 11. Therefore, if, excluding the sales commissions in question, we assume, as seems likely, that before

In 1954, Holding Company organized Security Life, a new wholly owned subsidiary licensed to engage in the insurance business. A new procedure was then adopted with respect to placing credit life insurance. It was referred by the Banks to, and written by an independent company, American National Insurance Company of Galveston, Texas (American National), at the same rate to the customer. American National then reinsured the policies with Security Life pursuant to a "treaty of reinsurance." For assuming the risk under the policies sold to the Banks' customers, Security Life retained 85% of the premiums. American National, which furnished actuarial and accounting services, received the remaining 15%. No sales commissions were paid. Under this new plan,[3] the Banks continued to offer credit life insurance to their borrowers in the same manner as before.[4]

Security Life was not a paper corporation. It commenced business in 1954 with an initial capital of $25,000,

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1954 the income of both respondents and of Management Company exceeded $25,000, then the total taxes paid by the Holding Company subsidiaries would not be affected if the commissions were allocated wholly to respondents, or to Management Company, or partially to all three.

[3] This plan was proposed to Holding Company by American National, which was making similar recommendations to other financial institutions. The Tax Court found that insurance companies anticipated that lending institutions would soon begin to form their own affiliated life insurance companies to write the credit insurance, which was proving to be a profitable business. Such a move by lending institutions would deprive the independent insurance companies of substantial credit insurance business. The type of plan recommended by American National was intended to salvage a portion of such business by charging a fee for the actuarial, accounting, and other services made available to Security Life, which reinsured the entire risk. T. C. Memo 1967–256.

[4] Taxpayers are, of course, generally free to structure their business affairs as they consider to be in their best interests, including lawful structuring (which may include holding companies) to minimize taxes. Perhaps the classic statement of this principle is Judge

which was increased in 1956 to $100,000. Although it did not become a full-line insurance company (contemplated as a possibility when organized), its reinsurance business was substantial. The risks assumed by it had grown to $41,350,000 by the end of 1959, and it had paid substantial claims.[5]

Security Life reported the entire amount of reinsurance premiums, 85% of the premiums charged, in its income for the years 1955–1959. Because the income of life insurance companies then was subject to a lower effective tax rate than that of ordinary corporations, the total tax liability for Holding Company and its subsidiaries was less than it would have been had Security Life paid a part of the premium to the Banks or Management Company as sales commissions.[6] Pursuant to his § 482

Learned Hand's comment in his dissenting opinion in *Commissioner* v. *Newman*, 159 F. 2d 848, 850–851 (CA2 1947):

"Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant."

See *Knetsch* v. *United States*, 364 U. S. 361, 365 (1960); Chirelstein, Learned Hand's Contribution to the Law of Tax Avoidance, 77 Yale L. J. 440 (1968).

[5] The opinion of the Tax Court, *supra*, includes tables showing the profitability of Security Life. Its net worth (capital and surplus) increased from $161,370.52 at the end of 1955 to $1,050,220 at the end of 1959, despite the paying out of claims and claims expenses over the five-year period totaling $525,787.91. The Tax Court found that: "Although Security Life's business proved to be successful, there was no way to judge at the outset whether it would succeed. In relation to its capital structure, Security Life reinsured a large amount of risk."

[6] Both the Life Insurance Company Tax Act for 1955, 70 Stat. 36, applicable to the years 1955–1957, and the Life Insurance Company Income Tax Act of 1959, 73 Stat. 112, applicable to later years, accorded preferential tax treatment to life insurance companies.

power to allocate gross income among controlled corporations in order to reflect the actual incomes of the corporations, the Commissioner determined that 40% of Security Life's premium income was allocable to the Banks as compensation for originating and processing the credit life insurance.[7] It is the Commissioner's view that the 40% of the premium income so allocated is the equivalent of commissions that the Banks earned and must be included in their "true taxable income."[8]

The parties agree that § 482 is designed to prevent "artificial shifting, milking, or distorting of the true net incomes of commonly controlled enterprises."[9] Treasury Regulations provide:

> "The purpose of section 482 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer, by determining according to the standard of an uncontrolled taxpayer, the true taxable income from the property and business of a controlled taxpayer. . . . The standard to be applied in every case is that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer."[10]

The question we must answer is whether there was a shifting or distorting of the Banks' true net income

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[7] The Commissioner made an alternative allocation to Management Company. Because it upheld his allocation to the Banks, the Tax Court rejected this alternative. In reversing the allocation to the Banks, the Court of Appeals found the record insufficient to pass on the alternative allocation. It therefore ordered that the case be remanded to the Tax Court for further consideration. The alternative allocation is therefore not before us.

[8] See 26 CFR § 1.482-1 (a)(6) (1971).

[9] B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders p. 15-21 (3d ed. 1971).

[10] 26 CFR § 1.482-1 (b)(1) (1971). The first regulations interpreting this section of the statute were issued in 1934. They have remained virtually unchanged. Jenks, Treasury Regulations Under Section 482, 23 Tax Lawyer 279 (1970).

resulting from the receipt and retention by Security Life of the premiums above described.[11]

We note at the outset that the Banks could never have received a share of these premiums. National banks are authorized to act as insurance agents when located in places having a population not exceeding 5,000 inhabitants, 12 U. S. C. A. § 92.[12] Although § 92 does not explicitly prohibit banks in places with a population of over 5,000 from acting as insurance agents, courts have held that it does so by implication.[13] The Comptroller

[11] The court below held that the mere generation of business does not necessarily result in taxable income. As we decide this case on a different ground, we need not consider the circumstances in which the origination or referral of business may or may not result in taxable income to the originating party. We do agree that origination of business does not necessarily result in such income. In this case if the Banks had been unaffiliated with any other entities (*i. e.*, had been separate, independent banks, unaffiliated with any holding company group), they would nevertheless have performed the "services" that the Commissioner asserts resulted in taxable income. These services—namely the negligible paperwork and the referring of the credit insurance to a company licensed to write it—were performed (as the Tax Court noted) for the convenience of bank customers and to assure additional collateral for loans. They also may have been necessary to meet competition. The fact of affiliation, enabling referral of the business to another subsidiary in the holding company group, does not alter the character of what was done. The act which is relevant, in terms of generating insurance premiums and commissions, is the *referral* of the business. Whether this referral is to an affiliated or an unaffiliated insurance company should make no difference as to whether the bank, which never receives the income, has earned it.

[12] Section 92 of the National Bank Act was enacted in 1916. When the statutes were revised in 1918 and re-enacted, § 92 was omitted. The revisers of the United States Code have omitted it from recent editions of the Code. However, the Comptroller of the Currency considers § 92 to be effective and he still incorporates the provision in his Regulations, 12 CFR §§ 2.1–2.5 (1971).

[13] *Saxon* v. *Georgia Association of Independent Insurance Agents, Inc.*, 399 F. 2d 1010 (CA5 1968). See *Commissioner* v. *Morris Trust*, 367 F. 2d 794, 795 (CA4 1966).

of the Currency has acquiesced in this holding,[14] and the Court of Appeals for the Tenth Circuit expressed its agreement in the opinion below.

The penalties for violation of the banking laws include possible forfeiture of a bank's franchise and personal liability of directors. The Tax Court found that the Banks, upon advice of counsel, "held the belief that it would be contrary to Federal banking law . . . to receive income resulting from their customers' purchase of credit insurance" and, pursuant to this belief, "the two Banks have never received or attempted to receive commissions or reinsurance premiums resulting from their customers' purchase of credit insurance." [15]

Petitioner does not contest this finding by the Tax Court or the holding in this respect of the Court of Appeals below. Accordingly, we assume for purposes of this decision that the Banks were prohibited from receiving insurance-related income, although this prohibition did not apply to non-bank subsidiaries of Holding Company.[16]

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[14] 12 CFR §§ 2.1–2.5 (1971).

[15] Findings of fact and opinion in T. C. Memo 1967–256, p. 67–1456, filed Dec. 27, 1967, in this case.

[16] MR. JUSTICE MARSHALL's dissenting opinion is based on the "crucial fact . . . [that] respondents [the Banks] have already violated the federal statute and regulations by soliciting insurance premiums." The statute, 12 U. S. C. A. § 92, prohibits a national bank from acting "as the agent" of an insurance company "by soliciting and selling insurance and collecting premiums on policies." MR. JUSTICE MARSHALL concludes that the banks have violated this statute, and notes that "the penalties . . . are indeed severe."

This finding of illegality, with respect to conduct of the Banks extending back to 1948, is without support either in the record or in any authority cited. Indeed, the record is to the contrary. The Tax Court found as a fact that there was no "agency agreement" between the Banks and the insurance companies; it further found that the Banks "*made available*" the credit insurance to their customers. There is no finding, and nothing in the record to support

We know of no decision of this Court wherein a person has been found to have taxable income that he did not receive and that he was prohibited from receiving. In cases dealing with the concept of income, it has been assumed that the person to whom the income was attributed could have received it. The underlying assumption always has been that in order to be taxed for income, a taxpayer must have complete dominion over it. "The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not." *Corliss* v. *Bowers*, 281 U. S. 376, 378 (1930).

It is, of course, well established that income assigned before it is received is nonetheless taxable to the assignor. But the assignment-of-income doctrine assumes

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a finding, that the Banks were agents of the insurance companies or that they engaged in "selling insurance" within the meaning of the statute. The Banks no doubt "solicited" in the sense that they encouraged their customers to take out the insurance. But in the absence of an agency relationship, and in view of the undisputed fact that the Banks received no commissions or premiums, it cannot be said that there was a violation of the statute. Moreover, the Banks were regularly examined by the federal banking authorities "looking for violations in the national banking laws." The making of credit insurance available to customers was and is a common practice in the banking business. There is no suggestion that the federal banking authorities considered this service to customers to be a violation of the law as long as the Banks received no commissions or fees. This administrative interpretation over many years is entitled to great weight.

The dissenting opinion raises this serious issue for the first time. It was not raised at any stage in the proceedings below. Nor was it briefed or argued in this Court. The Commissioner, the Tax Court, the Court of Appeals, and the Solicitor General all assumed that the Banks' conduct in this respect was perfectly lawful. But quite apart from the consistent administrative acceptance and from the assumptions by the Commissioner and the courts below, we think there is no basis for a finding of this serious statutory violation.

that the income would have been received by the taxpayer had he not arranged for it to be paid to another. In *Harrison* v. *Schaffner*, 312 U. S. 579, 582 (1941), we said:

> "[O]ne vested with the right to receive income [does] not escape the tax by any kind of anticipatory arrangement, however skillfully devised, by which he procures payment of it to another, since, by the exercise of his power to command the income, he enjoys the benefit of the income on which the tax is laid." [17]

One of the Commissioner's regulations for the implementation of § 482 expressly recognizes the concept that income implies dominion or control of the taxpayer. It provides as follows:

> "The interests controlling a group of controlled taxpayers are assumed to have complete power to cause each controlled taxpayer so to conduct its affairs that its transactions and accounting records truly reflect the taxable income from the property and business of each of the controlled taxpayers." [18]

This regulation is consistent with the control concept heretofore approved by this Court, although in a different context. The regulation, as applied to the facts in this case, contemplates that Holding Company—the controlling interest—must have "complete power" to shift income among its subsidiaries. It is only where this power exists, and has been exercised in such a way that the "true taxable income" of a subsidiary has been

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[17] See *Helvering* v. *Horst*, 311 U. S. 112 (1940) (assignment of interest coupons attached to bonds owned by taxpayer); *Lucas* v. *Earl*, 281 U. S. 111 (1930) (taxpayer assigned to wife one-half interest in his earnings). See generally *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948), and cases discussed therein at 604–610.

[18] 26 CFR § 1.482–1 (b)(1) (1971).

understated, that the Commissioner is authorized to reallocate under § 482. But Holding Company had no such power unless it acted in violation of federal banking laws. The "complete power" referred to in the regulations hardly includes the power to force a subsidiary to violate the law.

Apart from the inequity of attributing to the Banks taxable income that they have not received and may not lawfully receive, neither the statute nor our prior decisions require such a result. We are not faced with a situation such as existed in those cases, urged by the Commissioner, in which we held the proceeds of criminal activities to be taxable.[19] Those cases concerned situations in which the taxpayer had actually received funds. Moreover, the illegality involved was the act that gave rise to the income. Here the originating and referring of the insurance, a practice widely followed, is acknowledged to be legal. Only the receipt of insurance commissions or premiums thereon by national banks is not. Had the Banks ignored the banking laws, thereby risking the loss of their charters and subjecting their officers to personal liability,[20] the illegal-income cases would be relevant. But the Banks from the inception of their use of credit life insurance in 1948 were careful never to place themselves in that position. We think that fairness requires the tax to fall on the party that actually receives the premiums rather than on the party that cannot.[21]

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[19] *James* v. *United States*, 366 U. S. 213 (1961); *Rutkin* v. *United States*, 343 U. S. 130 (1952).

[20] 12 U. S. C. § 93.

[21] Thus, in *Commissioner* v. *Lester*, 366 U. S. 299 (1961), in determining that a taxpayer should not be taxed on alimony payments to his divorced wife, the Court determined that it was more consistent with the basic precepts of income tax law that the wife, who received and had power to spend the payments, should be taxed rather than the husband who actually earned the money.

In *L. E. Shunk Latex Products, Inc.* v. *Commissioner*, 18 T. C. 940 (1952), the Tax Court considered a closely analogous situation. The same interest controlled a manufacturer and a distributor of rubber prophylactics. The OPA Price Regulations of World War II became effective on December 1, 1941. Prior thereto the distributor had raised its prices to retailers, but the manufacturer had not increased the prices charged to its affiliated distributor. The Commissioner, acting under § 482, attempted to allocate some of the distributor's income to the manufacturer on the ground that a portion of the distributor's profits was in fact earned by the manufacturer, even though the manufacturer was prohibited by the OPA regulations from increasing its prices. In holding that the Commissioner had acted improperly, the Tax Court said that he had "no authority to attribute to petitioners income which they could not have received." 18 T. C., at 961.[22]

It is argued, finally, that the "services" rendered by the Banks in making credit insurance available to customers "would have been compensated had the corpora-

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[22] As noted at the outset of this opinion, certiorari was granted to resolve the conflict between the decision below and that in *Local Finance Corp.* v. *Commissioner*, 407 F. 2d 629 (CA7 1969). The Tax Court in this case felt bound to follow *Local Finance Corp.*, which was decided subsequently to *L. E. Shunk Latex Products, Inc.* v. *Commissioner*, 18 T. C. 940 (1952). For the reasons stated in the opinion above, we think *Local Finance Corp.* was erroneously decided and that the earlier views of the Tax Court were correct.

See *Teschner* v. *Commissioner*, 38 T. C. 1003, 1009 (1962):

"In the case before us, the taxpayer, while he had no power to *dispose* of income, had a power to appoint or designate its recipient. Does the existence or exercise of such a power alone give rise to taxable income in his hands? We think clearly not. In *Nicholas A. Stavroudis*, 27 T. C. 583, 590 (1956), we found it to be settled doctrine that a power to direct the distribution of trust income to others is not alone sufficient to justify the taxation of that income to the possessor of such a power."

tions been dealing with each other at arm's length." [23] The short answer is that the proscription against acting as insurance agent and receiving compensation therefor applies to *all* national banks located in places with population in excess of 5,000 inhabitants. It applies equally to such banks whether or not they are controlled by a holding company. If these Banks had been independent of any such control—as most banks are—no commissions or premiums could have been received lawfully and there would have been no taxable income.[24] As stated in the Treasury Regulations, the "purpose of section 482 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer . . . ." [25] We think our holding comports with such parity treatment.

We conclude that the premium income received by Security Life could not be attributable to the Banks. Holding Company did not utilize its control over the Banks and Security Life to distort their true net incomes. The Commissioner's exercise of his § 482 authority was therefore unwarranted in this case. The judgment below is

Affirmed.

MR. JUSTICE MARSHALL, dissenting.

The facts of this case illustrate the natural affinity that lending institutions and insurance companies have for each other. Congress depends on the ability of the Commissioner of Internal Revenue to utilize § 482 of the Internal Revenue Code, 26 U. S. C. § 482, to insure that this affinity does not provide a basis for tax avoidance. H. R. Rep. No. 1098, 84th Cong., 1st Sess., 7; S. Rep. No. 1571, 84th Cong., 2d Sess., 8. In my opin-

[23] See dissenting opinion of MR. JUSTICE BLACKMUN, *post*, at 422.

[24] If an unaffiliated bank were able to provide the insurance at a cheaper rate because no commissions were paid, this would benefit the customers but would result in no taxable income.

[25] 26 CFR § 1.482–1 (b)(1) (1971).

ion, today's decision renders § 482 a less efficacious weapon against tax avoidance schemes than Congress intended and provides the respondents with an unwarranted tax advantage. I dissent.

Section 482 provides:

> "In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary or his delegate may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses."

First enacted as § 45 of the Revenue Act of 1928, 45 Stat. 806, the statute was intended to prevent the avoidance of tax liability through fictions and "to deny the power to shift income . . . arbitrarily among controlled corporations, and to place such corporations rather on a parity with uncontrolled concerns." *Central Cuba Sugar Co.* v. *Commissioner*, 198 F. 2d 214, 216 (CA2 1952). See H. R. Rep. No. 2, 70th Cong., 1st Sess., 16–17; S. Rep. No. 960, 70th Cong., 1st Sess., 24–25. It is intended to serve the same purpose in the present Code.

It is well-established law that in analyzing a transaction under § 482, the test is whether the arrangement as structured for income tax purposes by interlocking corporate interests would have been similarly structured by taxpayers dealing at arm's length. See, *e. g.*, *Borge* v. *Commissioner*, 405 F. 2d 673 (CA2 1968), cert. denied *sub nom. Danica Enterprises* v. *Commissioner*, 395 U. S.

933 (1969); *Eli Lilly & Co.* v. *United States,* 178 Ct. Cl. 666, 372 F. 2d 990 (1967).

Applying that test to this case, the following facts are relevant. Before 1954, an independent insurance company paid respondents commissions ranging from 40% to 45% for their services in offering insurance to borrowers designed to discharge their debts in the event that they died or became disabled during the term of their loans. After 1954, respondents offered borrowers policies issued by a different insurance company. At this time the holding company that controlled respondents created a new subsidiary to reinsure the borrowers who purchased policies. By paying off the independent insurance company with 15% of the proceeds of the policies, the subsidiary assumed the insurance risks and garnered the remaining 85% of the proceeds. No commission was paid to respondents by either the independent company or the insurance subsidiary.

The tax advantage of the post-1954 structure derived from the fact that the Life Insurance Company Tax Act for 1955, 70 Stat. 36, as amended by the Life Insurance Company Income Tax Act of 1959, 73 Stat. 112, as amended, 26 U. S. C. § 801 *et seq.,* gives preferential tax treatment to life insurance companies. By funneling all proceeds from the sales of the insurance policies to a subsidiary that qualified for tax treatment as a life insurance company, the holding company avoided the heavier tax that would have been imposed on respondents had they been paid commissions.

The Commissioner's analysis of this case is not overly complex: He saw that respondents performed essentially the same services and generated the same income after 1954 that they did before, and he concluded that § 482 required that they should be taxed on the premiums that they were actually earning.

Based on respondents' earlier experience dealing *at arm's length* with an independent insurance company and on the well-known fact that insurers pay solicitors a portion of the premium as a commission for generating income, see *Local Finance Corp.* v. *Commissioner,* 48 T. C. 773, 786 (1967), aff'd, 407 F. 2d 629, 631–632 (CA7 1969), the Commissioner determined that 40% of the premium income was properly allocated to respondents.

The respondents make, in essence, two arguments in their attempt to rebut the Commissioner's position. First, they urge that they never received any funds as a result of offering the policies to borrowers, and that it is therefore unfair to tax them on any portion of said proceeds. If § 482 is to have any meaning, that argument must be rejected. It makes absolutely no sense to examine this case with a technical eye as to whether respondents actually received or had a "right" to receive any commissions. This is not a case involving independent companies or private individuals where we must scrupulously avoid taxing someone on money he will never receive regardless of his will in the matter. See, *e. g., Blair* v. *Commissioner,* 300 U. S. 5 (1937); cf. *Teschner* v. *Commissioner,* 38 T. C. 1003 (1962). This is a case involving related corporations, and § 482 recognizes that such corporations may be treated differently from natural persons or unrelated corporations for certain tax purposes.

We need not look far to find that this entire complicated economic structure—established, designed, administered, and amendable by the holding company—had the right to the proceeds. Pursuant to § 482, the Commissioner properly attempted to insure that the proceeds would be equitably allocated.

The Court apparently concedes that if respondents' only argument against taxation were that they have

received no money, that argument would fail. This concession is, in fact, mandated by various decisions of this Court, including *Harrison* v. *Schaffner,* 312 U. S. 579 (1941); *Helvering* v. *Horst,* 311 U. S. 112 (1940), and *Lucas* v. *Earl,* 281 U. S. 111 (1930).

Having implicitly rejected the argument that mere nonreceipt of money is sufficient to avoid taxation, the Court proceeds to accept respondents' second argument that in this case the taxpayer is legally barred from ever receiving money, and in this circumstance he cannot be taxed on it. Respondents find a legal bar to receipt of the proceeds at issue here in 12 U. S. C. A. § 92, which provides:

> "In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which such bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent; and may also act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located, receiving for such services a reasonable fee or commission: *Provided, however,* That no such bank shall in any case guarantee

> either the principal or interest of any such loans or assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance."

This statute by inference and the regulations of the Comptroller of the Currency, 12 CFR §§ 2.1–2.5, by explicit language bar national banks in communities with more than 5,000 inhabitants from selling, soliciting, or receiving the proceeds from selling insurance. Respondents are within the legal prohibition and the penalties provided for a violation are indeed severe. Assuming that the respondents will not attempt to violate the law and not wishing to appear to encourage a violation, the Court concludes that respondents will receive none of the proceeds and that they cannot be taxed on money they will never receive.

But the crucial fact in this case is that under their own theory respondents have already violated the federal statute and regulations by soliciting insurance premiums. Title 12 U. S. C. A. § 92 was added to the federal banking laws in 1916 at the suggestion of John Skelton Williams, who was then Comptroller of the Currency. He wrote to Congress to recommend that national banks in small communities be permitted to associate with insurance companies, but that banks in larger communities be prohibited from doing the same:

> "It seems desirable from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities. This additional income will strengthen them and increase their ability to make a fair return to their shareholders, while the new business is not likely to

> assume such proportions as to distract the officers of the bank from the principal business of banking. Furthermore in many small places the amount of insurance policies written . . . is not sufficient to take up the entire time of an insurance broker, and the bank is not therefore likely to trespass upon outside business naturally belonging to others.
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> "I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers. I think it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores. . . ." Letter of June 8, 1916, to Senate, 53 Cong. Rec. 11001.

There is nothing in the history of the provision to indicate that Congress was more concerned with banks' actually receiving money than with their performing the activities that generated the money. In fact, the history that is available indicates that it is the activities themselves that Congress wished to stop. Banks in large communities were simply not permitted to do anything that insurance agents might do, *i. e.*, they were not permitted to solicit insurance.

Under respondents' theory of the case, the legal violation is thus a *fait accompli* and the respondents are taxable as if there had been no illegality.[1] See, *e. g.*, *United*

[1] Neither the statute nor the regulations use the words "originating and referring" insurance. These are the words chosen by the Court to describe the respondents' activities, *ante*, at 405. The statute and regulations speak of "soliciting and selling." Because the respondents themselves argue that they would violate § 92 and the regulations were they to receive the income generated by their activities, I assume that they, in effect, are admitting that these activities amounted to "soliciting and selling" insurance. Thus,

States v. *Sullivan*, 274 U. S. 259 (1927); *Rutkin* v. *United States*, 343 U. S. 130 (1952); *James* v. *United States*, 366 U. S. 213 (1961). See also *Tank Truck Rentals* v. *Commissioner*, 356 U. S. 30 (1958).

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the Commissioner could properly determine that the statute was violated by the acts of solicitation, and, as the Court recognizes, since "the illegality involved was the act which gave rise to the income," this Court's prior decisions permit the Commissioner to tax the income of the lawbreakers.

If, however, the Court is attempting to distinguish *sub silentio* between "originating and referring" and "soliciting" and is concluding that only the latter is illegal, then there is nothing in the statute or regulations that would make illegal the receipt of income generated by the former. Hence, the Commissioner could reject the respondents' second argument that it would violate federal banking laws to include the proceeds in their income.

Whichever approach the Court selects, the statute requires consistency—*i. e.*, the statute requires that the activities that produce income be illegal before the receipt of the income is deemed to violate the law.

I agree with the Court that deference must be paid to the expertise of the Comptroller, but in proposing that § 92 be added to the already existing banking laws, Comptroller Williams himself noted that "[i]t is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." Letter of June 8, 1916, *supra*.

Senator Owen, who shepherded the 1916 legislation through the Senate, noted at one point that § 92 is not a very important part of the statute. 53 Cong. Rec. 11001. Perhaps, it is therefore unimportant whether or not the respondents have technically violated it. Whether or not the Comptroller has properly permitted such activities to take place may also be of no great moment.

What is critical to a correct disposition of this case, in my view, is that if respondents' activities are not illegal, there is no reason that receipt of the income generated from them should be illegal. It should be pointed out that the theory that receipt of said income would be illegal was first proffered by respondents' counsel. This theory is certainly self-serving in the sense that it provides what the Court regards as the dispositive factor in this case without hindering the activities of the holding company in any way.

The Court suggests that the Commissioner has never relied on the

The Court seeks, however, to distinguish all of the prior cases holding that a taxpayer may be taxed on income illegally earned on the ground that the issue was never raised as to whether the taxpayers in those cases had actually received the income. The distinction is valid but it does not warrant a different result in this case.

The reasoning of the majority runs along these lines: if A violates the law—by attempted embezzlement or by illegally soliciting insurance sales, for example—but he receives no money and has no "legal right" to receive any money, then he cannot be taxed as if the money had been received; but, if A actually embezzles money or receives insurance premiums in violation of the law, A can be taxed even though he may have transferred the money without any personal gain to a third party from whom he has no right of recovery.

I would agree with this analysis in most cases. Where I differ from the Court is in which category to place this transaction. To pretend that respondents have not received any money and have no right to any money is to ignore the thrust of § 482. That section requires that we treat this case as if the commissions had been paid to

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theory of the case expressed in this opinion. On the contrary, the Commissioner argued in his brief (p. 13) as follows:

"The Commissioner's allocation does not force respondents to violate the federal banking law. It was they, not the Commissioner, who chose to solicit and sell credit life insurance at a rate set at a sufficiently high level to permit the payment of commissions. If their activities did not violate the banking law, the Commissioner's allocation will not, of itself, constitute a violation on their part. And, surely, the payment of taxes would not be an illegal act."

Both sides dealt with this point in oral argument. Tr. of Oral Arg. 14–18, 30, 40.

This is the nub of the case. What is there in the legislative history or the purpose of § 92 that requires that we treat the activities as legal, but the receipt of the income they generate as illegal?

respondents and had been transferred to the insurance subsidiary by them. Of course, that did not occur. But, we know that the whole notion of the section is to look behind the form in which a transaction is structured to its substance. The substance is either that the respondents violated federal law, earned illegal income, attempted to avoid taxation on the income by channeling it elsewhere, and were caught by the Commissioner; or, that they did not violate federal law by soliciting sales of insurance and that there is no legal bar to their receiving the proceeds from their sales. In either case, the result is the same, and respondents cannot prevail.

If respondents had actually received the proceeds and transferred them to the insurance subsidiary, they would still be free to make essentially the same argument that they make in this case, *i. e.*, they could argue that federal law prohibited them from receiving the money; that they violated federal law, but had no right to keep the money; and that they should not be taxed on receipt of funds which they could not legally keep.

To be consistent with the assignment-of-income cases, *Helvering* v. *Horst, supra,* and *Lucas* v. *Earl, supra,* and the line of cases that includes *Rutkin* v. *United States, supra,* and *James* v. *United States, supra,* the Court would have to reject this argument. Yet, I maintain that this is just what the taxpayer is arguing here. The Commissioner has determined that in reality the respondents have earned income, and he has taxed it under § 482. To reject his position is to give undue weight to the absence of technical temporary possession of money and some abstract concept of a "right" to receive it. I had thought that this kind of technical reasoning was rejected in *James* v. *United States, supra,* when the Court overruled *Commissioner* v. *Wilcox,* 327 U. S. 404 (1946).

Finally, even if there is some mysterious reason why the banking laws should be read in the manner suggested by respondents, there is still another reason why they should not prevail. The fact would remain that they consciously chose to perform services in order that their parent holding company would reap financial rewards.[2] Certainly, there is nothing in the federal banking laws that required the performance of these services. In the context of a complex corporate structure ministered by one large holding company, the purposes of § 482 are best served by permitting the Commissioner to allocate income to the company that earns it, rather than to the company that receives it. Again, we must remember that this is not a case of unrelated private individuals or independent corporations where there might be some danger that in allocating income to the person who generated but did not receive it, the Commissioner would render that person financially unable to pay his taxes. This case involves one large interrelated system. It would be total fiction to assume that the holding company would leave its subsidiaries in a financial bind. Hence, there is no good reason to bar the Commissioner from taxing respondents on the money that they earn.[3]

In my view, the Commissioner has done exactly what § 482 requires him to do in this case. Accordingly, I

[2] While the premiums from the insurance policies were not paid directly to the parent, there can be no doubt that the parent benefited from the financial success of its subsidiaries.

[3] We know that nontax statutes do not normally determine the tax consequences of a particular transaction. There is no inherent inconsistency in reading the banking legislation as making the receipt of insurance premiums illegal, and, at the same time, reading the Internal Revenue Code as allowing the Commissioner to allocate the income from the sale of insurance policies to the party actually earning it, so long as the income is received by the corporation controlling that party.

would reverse the decision of the Court of Appeals and would remand the case with a direction that judgment be entered for the petitioner.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE joins, dissenting.

As I read the Court's opinion, I gain the impression that it chooses to link legality with taxability or, to put it better oppositely, that it ties illegality to receive with inability to tax. I find in the Internal Revenue Code no authority for the concoction of a restrictive connection of that kind. Because I think that the Commissioner's allocation of income here, under the auspices of § 482 of the 1954 Code, and in the light of the established facts, was proper, I dissent.

1. Section 482 [1] surely contemplates taxation of income without formal receipt of that income. That, indeed, is the scope and purport of the statute. It is directed at income distortion by a controlling interest among two or more of the controlled entities. I, therefore, am not convinced that the fact the income in question here did not flow through the Banks at any time—because it was deemed proscribed by the 1916 Act (if the pertinent portion thereof, 39 Stat. 753, is still in effect, a proposition which may not be free from doubt),[2] and because the

[1] Section 482 is not new. It appeared as § 45 of the Revenue Act of 1928, 45 Stat. 806, and has predecessors in § 240 (f) of the Revenue Act of 1926, 44 Stat. 46, and in § 240 (d) of the Revenue Act of 1924, 43 Stat. 288.

[2] The revisers of the United States Code in 1952 omitted the section because of the possibility of its having been repealed by its omission from the amendment and re-enactment in 1918 of § 5202 of the Revised Statutes by § 20 of the War Finance Corporation Act, 40 Stat. 512. Compare administrative ruling No. 7110 of the Comptroller of the Currency with the Comptroller's current regulations, 12 CFR §§ 2.1–2.5. See *Saxon* v. *Georgia Association of Independent Insurance Agents, Inc.*, 399 F. 2d 1010 (CA5 1968); *Com-*

controlling interest routed it elsewhere—serves, in and of itself, to deny the efficacy of the statute.

2. Section 482 has a double purpose and a double target. It authorizes the Secretary or his delegate, that is, the Commissioner, to allocate whenever he determines it necessary so to do in order (a) "to prevent evasion of taxes" or (b) "clearly to reflect the income of any" of the controlled entities. The use of the statute, therefore, is not restricted to the intentional tax evasion. No evasion of tax, in the criminal sense, by these Banks is specifically suggested or at issue here. And I do not subscribe to my Brother MARSHALL's intimation that what the Banks were doing was otherwise illegal. The second alternative of the statute, however, is directed at something other than tax evasion or illegality. It is concerned with the proper reflection of income (or deductions, credits, or allowances) so as to place the controlled taxpayer on a tax parity with the uncontrolled taxpayer. It is designed to produce for tax purposes, and to recognize, economic realities and to have the tax consequences follow those realities and not some structured nonreality. This is the aspect of the statute with which the Commissioner and these respondents are here concerned. Thus, legality and illegality seem to me to be beside the point.

3. From this it follows that the Court's repetitive emphasis on the missing § 92 and the inability of these Banks legally to receive the insurance commissions give undue emphasis to the first alternative of § 482, and seem almost wholly to ignore the second.

4. The purpose of the controlling interest in structuring the several entities it controls is apparent and can-

missioner v. *Morris Trust*, 367 F. 2d 794, 795 (CA4 1966); Hackley, Our Baffling Banking System, pt. 2, 52 Va. L. Rev. 771, 777–779 (1966). United States Code Annotated carries the provision as § 92 of its Title 12.

not be concealed. The Banks were wholly owned subsidiaries of Holding Company. The Tax Court found—and the respondents concede [3]—that one of the purposes of the Banks' arranging for borrowers' credit life insurance [4] was "to provide an additional source of income—part of the premiums from the insurance—to Holding Company or its subsidiaries." T. C. Memo 1967–256, p. 67–1453. For me, that means to provide an additional source of income for the group irrespective of the particular pocket into which that income might initially be routed.

5. What, then, happened? The chronology is revealing:

(a) Initially, that is, until 1954, the Banks solicited the insurance, charged the premium, and forwarded it to Management Company. The latter in turn sent it on to the then-favored independent insurance carrier. That carrier paid the recognized sales commission to Smith, Management Company's wholly owned insurance agency.[5]

(b) In 1954 the American National-Security Life arrangement appeared on the scene. This was prompted by the blossoming of the credit insurance business as a profitable undertaking. Obviously, it was a matter of concern to established and independent insurance companies when they came to realize that lending institutions were in a position to form their own insurance affiliates

[3] Brief for Respondents 2.

[4] I use this and other terms as they have been defined in the Court's opinion.

[5] Despite this payment to Smith, it was not Smith, but Management Company, that reported the commissions as taxable income. This reveals the fluidity of control of the structure. Of course, the fact that the Commissioner did not allocate the premiums to the Banks during this period is of small, if any, significance, for, as the Court points out, *ante*, at 397–398, n. 2, the then tax rate for each of the corporate entities was likely the same. The Government thus would lose nothing by not allocating.

to tap and drain away profits that the independents theretofore had received without hindrance. Security Life was just such an emerging insurance affiliate of Holding Company and of Management Company. But American National, by its proposal to Management Company, as well as to other financial institutions, salvaged 15% of the premium dollar in return for actuarial and accounting services. Security Life never did develop into a full-line insurance company; it remained essentially a re-insurer and yet it accomplished the purpose for which it was given life. Now no sales commissions needed to be paid. In fact, none were paid; they just disappeared, and that erstwhile cost remained as profit in Security Life. But the Banks, as before, solicited their borrowing customers to purchase credit life insurance.

(c) The Life Insurance Company Tax Act for 1955 was enacted, 70 Stat. 36, followed by the Life Insurance Company Income Tax Act of 1959, 73 Stat. 112. These statutes served to accord preferential tax treatment—as compared to ordinary corporations—to life insurance companies. See *United States* v. *Atlas Life Ins. Co.*, 381 U. S. 233 (1965). This happily coincided, of course, with Security Life's development.

6. Only the Banks were the responsible force behind the premium income. No one else was. Certainly American National was not. Certainly Security Life was not. Smith was out of the picture. And if it can be said that Management Company or Holding Company contributed a part, they did so only secondarily. It was the participating bank that explained to the borrower the function and availability of the insurance; that gave the customer the application form; that examined the application; that prepared the certificate of insurance; that collected the premium or added it to the loan; and that sent the form and the premium to Management Company. It was the participating bank that thus

offered and sold on behalf of a life insurance company under common control with the bank. It was the participating bank, in short, that did what was necessary, and all that was necessary, to sell the insurance. Clearly, services were rendered by that bank on behalf of its commonly controlled affiliate. Just as clearly, those services would have been compensated had the corporations been dealing with each other at arm's length.

7. It is no answer to say that generation of income does not necessarily lead to taxation of the generator; here the earnings themselves stayed within the corporate structure dominated by Holding Company, and did not pass elsewhere with consequent tax impact elsewhere. I do not so easily differentiate, as does the Court, *ante*, at 401 n. 11, between referral outside the affiliated structure and referral conveniently within that structure to a re-insurance company that could be taxed on the premium income (unreduced by commissions) at advantageous tax rates.

8. That the selling effort of the Banks seems comparatively minimal and that the processing cost seems comparatively negligible are, I believe, beside the point and quite irrelevant. No one else devoted effort or incurred cost of any significance whatsoever. Taxability has never depended on approximating expenses to receipts; in fact, the less the cost, the greater the net income and the greater the tax burden.

9. Neither is it an answer to say that before the organization of Security Life the Banks did not receive income from credit insurance premiums and that, therefore, the emergence of Security Life did not change the situation so far as the Banks were concerned. For me, it very much changed the situation, for the controlled structure took over the insurance business and the premiums thenceforth were nestled within that structure.

10. Taxability, despite nonreceipt, is common in our tax law. It is present in a variety of contexts. For example, one has been held taxable, under the applicable statute's general definition of gross income, for income or earnings assigned to another and never received; [6] for the income from bond coupons, maturing in the future, assigned to another and never received; [7] for dividends paid to the shareholders of a transferor corporation pursuant to a lease with no defeasance clause; [8] for another's income from a short-term trust [9] (until § 673, with its 10-year measure, came into the tax structure with the 1954 Code); for the employer's payment of income taxes on his employees' compensation; [10] and for an irrevocable trust's income used to pay insurance premiums on the settlor's life,[11] or, in the absence of particular state law provisions, distributed to a divorced wife in lieu of alimony [12] (until § 215 came into the Code with the Revenue Act of 1942, 56 Stat. 817).

11. In the area of federal estate taxation an obvious parallel is found in the many instances of includability in the decedent's gross estate of property not owned or possessed by the decedent at his death. The Code itself provides for the inclusion of transfers theretofore effec-

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[6] *Harrison* v. *Schaffner*, 312 U. S. 579 (1941); *Helvering* v. *Eubank*, 311 U. S. 122 (1940); *Burnet* v. *Leininger*, 285 U. S. 136 (1932); *Lucas* v. *Earl*, 281 U. S. 111 (1930). Cf. *Hoeper* v. *Tax Comm'n*, 284 U. S. 206 (1931); *Blair* v. *Commissioner*, 300 U. S. 5 (1937). See *Commissioner* v. *Sunnen*, 333 U. S. 591, 604–610 (1948); *United States* v. *Mitchell*, 403 U. S. 190 (1971).

[7] *Helvering* v. *Horst*, 311 U. S. 112 (1940).

[8] *United States* v. *Joliet & Chicago R. Co.*, 315 U. S. 44 (1942).

[9] *Helvering* v. *Clifford*, 309 U. S. 331 (1940).

[10] *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716 (1929).

[11] *Burnet* v. *Wells*, 289 U. S. 670 (1933).

[12] *Douglas* v. *Willcuts*, 296 U. S. 1 (1935); *Helvering* v. *Fitch*, 309 U. S. 149 (1940); see *Commissioner* v. *Lester*, 366 U. S. 299 (1961).

tively made, but in contemplation of death, 26 U. S. C. § 2035; of a variety of *inter vivos* irrevocable transfers in trust, 26 U. S. C. §§ 2036–2038; and of joint interests, 26 U. S. C. § 2040, in all of which situations the ownership interest at death was nonexistent or less than full.

12. This demonstrates for me that there have been and are many examples of taxation of income without that "complete dominion" over it that the Court now finds so necessary. The quotation, cited by the Court, from Mr. Justice Holmes' opinion in *Corliss* v. *Bowers*, 281 U. S. 376, 378 (1930), consists of language used to *support* the taxation of income; it is not language, as the Court would make it out to be, that supported the nontaxation of income. The Justice's posture—and the Court's—in that case surely looks as much, and perhaps more, to includability here than it does to excludability.[13]

13. The Court shrinks from extending the possibility of taxation-without-receipt to the situation where the taxpayer is "prohibited from receiving" the income by another statute. It states that no decision of the Court has as yet gone that far. It is equally true that no decision of the Court has refrained from going that far.

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[13] ". . . But the net income for 1924 was paid over to the petitioner's wife and the petitioner's argument is that however it might have been in different circumstances the income never was his and he cannot be taxed for it. The legal estate was in the trustee and the equitable interest in the wife.

"But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. . . ." 281 U. S., at 377–378. In another case Mr. Justice Holmes said:

"There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. . . ." *Lucas* v. *Earl*, 281 U. S. 111, 114–115 (1930).

The Seventh Circuit has not been concerned with the existence of a prohibitory regulating statute, *Local Finance Corp.* v. *Commissioner,* 407 F. 2d 629 (1969), cert. denied, 396 U. S. 956, and this Court should not be. The Congress, in enacting the Life Insurance Company Tax Act for 1955, was of the opinion that § 482 was available to the Commissioner with respect to insurance companies that are captives of "finance companies." H. R. Rep. No. 1098, 84th Cong., 1st Sess., 7; S. Rep. No. 1571, 84th Cong., 2d Sess., 8.[14]

14. The Court's reluctance is reminiscent of the "claim of right" doctrine, which found expression in the unfortunate and short-lived (15 years) decision in *Commissioner* v. *Wilcox,* 327 U. S. 404 (1946), to the effect that embezzled income was not taxable to the embezzler. *Wilcox,* of course, stood in sharp contrast to *Rutkin* v. *United States,* 343 U. S. 130 (1952), where money obtained by extortion was held to be taxable income to the extortioner; it was overruled, at last, in *James* v. *United States,* 366 U. S. 213 (1961). In *Wilcox,* as here, the Court wrestled with the concept and imaginary barrier of illegality, was impressed by it, and, as in this case, concluded that illegality and taxability did not mix and could not be linked. That doctrine encountered resistance in *Rutkin* and in *James,* and was rightly rendered an aberration by those later decisions.

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[14] "There is a potential abuse situation in the case of the so-called captive insurance companies. It may be possible for a finance company, for example, to establish a subsidiary life insurance company that will issue life insurance policies in connection with the business of the parent. If the subsidiary charges excessive premium on this business, a portion of the income of the parent company can be diverted to the life insurance company. It is believed that section 482 of the Internal Revenue Code of 1954 (relating to allocation of income and deductions among related taxpayers) provides the Secretary of the Treasury ample regulative authority to deal with this problem."

15. I doubt if there is much comfort for the Court in *L. E. Shunk Latex Products, Inc.*, 18 T. C. 940 (1952), for there the significant fact was that the taxpayer could not have raised its price even to a noncontrolled distributor.

In conclusion, I note that the Court of Appeals remanded Management Company's case to the Tax Court for consideration of the § 482 allocation, alternatively proposed, to that corporation. With this I must be content. At least Management Company is not a national bank, and the barrier that the Court has found in the missing § 92 supposedly does not provide a protective coating for Management Company or, for that matter, for Holding Company.

And so it is. The result of today's decision may not be too important, for it affects only a few taxpayers. It seems to me, however, that it effectively dulls one edge of what has been a sharp two-edged tool fashioned and bestowed by the Congress upon the Internal Revenue Service for the effective enforcement of our federal tax laws.

SCHNEBLE *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 68–5009. Argued January 17–18, 1972—
Decided March 21, 1972

Petitioner was found guilty of murder following a jury trial in which police officers testified as to the detailed confession that he had given to them and in which one officer related a statement made to him by petitioner's codefendant, who did not testify, which tended to undermine petitioner's initial (but later abandoned) version and to corroborate certain details of petitioner's confession. The Supreme Court of Florida affirmed. Petitioner claims that the admission into evidence of his codefendant's statement deprived him of his right to confrontation in violation of *Bruton* v. *United States*, 391 U. S. 123. *Held:* Any violation of *Bruton* that might have occurred was harmless beyond a reasonable doubt in view of the overwhelming evidence of petitioner's guilt as manifested by his confession, which completely comported with the objective evidence, and the comparatively insignificant effect of the codefendant's admission. Pp. 429–432.

215 So. 2d 611, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion in which DOUGLAS and BRENNAN, JJ., joined, *post*, p. 432.

Clyde B. Wells argued the cause and filed a brief for petitioner.

George R. Georgieff, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Robert L. Shevin*, Attorney General.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Schneble and his codefendant Snell were tried jointly in a Florida state court for murder. At the trial neither defendant took the stand, but police

witnesses testified to certain admissions made by each defendant implicating both of them in the murder. Both defendants were convicted, and the Florida Supreme Court affirmed. This Court vacated and remanded the case for further consideration in the light of *Bruton* v. *United States,* 391 U. S. 123 (1968). *Schneble* v. *Florida,* 392 U. S. 298 (1968). Upon remand, the Supreme Court of Florida reversed Snell's conviction, finding that it had been obtained in violation of *Bruton,* but affirmed petitioner's conviction. We again granted certiorari, limited* to the question of whether petitioner's conviction had been obtained in violation of the *Bruton* rule. In the circumstances of this case, we find that any violation of *Bruton* that may have occurred at petitioner's trial was harmless beyond a reasonable doubt. We therefore affirm.

The State's case showed that a threesome consisting of petitioner, Snell, and the victim, Mrs. Maxine Collier, left New Orleans in a borrowed automobile en route to Florida. While they were traveling across the Florida Panhandle, Mrs. Collier was murdered, and her body placed in the trunk of the automobile. The body was then transported in the car to the environs of Tampa, where it was left behind some bushes in a trash dump. Petitioner and Snell then continued their odyssey southward to the Florida Keys, and thence north along the east coast of Florida. They were apprehended for unrelated offenses in West Palm Beach, but upon discovering blood in the trunk of the car police officers there

*The question of whether Schneble's sentence of death in this case violates the Eighth and Fourteenth Amendment proscription of "cruel and unusual punishment" is therefore not at issue here. That question is currently under consideration in *Aikens* v. *California,* No. 68–5027, and companion cases. All executions in Florida have been stayed by the Governor's executive order until July 1, 1973. See Fla. Exec. Order No. 72–8 (Feb. 21, 1972).

commenced the investigation that ultimately led to the charging of petitioner and Snell with the murder of Mrs. Collier.

The investigating officers testified at the trial that petitioner initially, while admitting knowledge of the murder, claimed that Snell had shot Mrs. Collier while petitioner was away from the car taking a walk. Petitioner later conceded, however, that his earlier story was false. He admitted to the police that it was he who had strangled Mrs. Collier, and that Snell had finally shot her in the head as she lay dying. The state court held these admissions of petitioner to be voluntary and admissible. Since our grant of certiorari here was limited to the *Bruton* issue, our treatment of that question assumes that these admissions were properly before the trial court.

One of the investigating officers also related at trial a statement made to him by Snell. Petitioner challenges this testimony as violative of *Bruton*, since Snell did not take the stand and thus was not available for cross-examination. According to the testimony of this officer, Snell said petitioner had occupied the rear seat of the car and had never left Snell alone in the car with Mrs. Collier during the trip. While Snell's statement fell far short of the type of comprehensive and detailed confession made by petitioner, it did tend to undermine petitioner's initial (but later abandoned) claim that he had left Snell alone during the time at which the murder occurred. Snell's statement also placed petitioner in the position in the car from which the victim could more easily have been strangled. Thus, petitioner claims, the introduction of Snell's out-of-court statement, not subject to effective cross-examination, deprived petitioner of his right of confrontation in violation of *Bruton*.

The Court held in *Bruton* that the admission of a confession of a codefendant who did not take the stand deprived the defendant of his rights under the Sixth

Amendment Confrontation Clause, when that confession implicated the defendant. Even when the jury is instructed to consider the confession only against the declarant, the Court in *Bruton* determined that the danger of misuse of the confession by the jury was too great to be constitutionally permissible. *Bruton* was held to be retroactive in *Roberts* v. *Russell,* 392 U. S. 293 (1968), and thus applies to the instant case even though it was tried more than two years prior to *Bruton.*

The mere finding of a violation of the *Bruton* rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.

In *Harrington* v. *California,* 395 U. S. 250 (1969), the defendant was tried for murder jointly with three others. As in the instant case, he admitted being at the scene of the crime, but denied complicity. One of his codefendants, who confessed and implicated him, took the stand and was subject to cross-examination. The other two codefendants, whose statements corroborated defendant's presence at the scene of the crime, did not take the stand. Noting the overwhelming evidence of Harrington's guilt, and the relatively insignificant prejudicial impact of these codefendants' statements, the Court held that any violation of *Bruton* that had occurred was harmless error.

In the instant case, petitioner's confession was minutely detailed and completely consistent with the objective evidence. He informed police of the precise location at which they ultimately located the body, and guided them to this out-of-the-way spot. Although petitioner initially tried to put the sole blame on Snell,

this version of the facts did not satisfactorily explain certain deep rope burns on petitioner's hands. When confronted with the fact of the rope burns, petitioner admitted that he and Snell had plotted to kill Mrs. Collier in order to steal her money and the automobile.

Petitioner confessed that he had strangled Mrs. Collier with a plastic cord, and recounted the commission of the crime in minute and grisly detail culminating in Snell's shooting the victim in the head because she still showed signs of life after the strangulation. These details of petitioner's later account of the offense were internally consistent, were corroborated by other objective evidence, and were not contradicted by any other evidence in the case. They were consistently reiterated by petitioner on several occasions after his first exposition of them.

Not only is the independent evidence of guilt here overwhelming, as in *Harrington*, but the allegedly inadmissible statements of Snell at most tended to corroborate certain details of petitioner's comprehensive confession. True, under the judge's charge, the jury might have found the confession involuntary and therefore inadmissible. But this argument proves too much; without Schneble's confession and the resulting discovery of the body, the State's case against Schneble was virtually nonexistent. The remaining evidence in the case—the disappearance of Mrs. Collier sometime during the trip, and Snell's statement that Schneble sat in the back seat of the car during the trip and never left Snell alone with Mrs. Collier—could not by itself convict Schneble of this or any other crime. Charged as they were by the judge that they must be "satisfied beyond a reasonable doubt" and "to a moral certainty" of Schneble's guilt before they could convict him, the jurors could on no rational hypothesis have found Schneble guilty without reliance on his confession. Judicious ap-

plication of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face. See *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 504–505 (1957).

Having concluded that petitioner's confession was considered by the jury, we must determine on the basis of "our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of an average jury," *Harrington* v. *California*, *supra*, at 254, whether Snell's admissions were sufficiently prejudicial to petitioner as to require reversal. In *Bruton*, the Court pointed out that "[a] defendant is entitled to a fair trial but not a perfect one." 391 U. S., at 135, quoting *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953). Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. See *Chapman* v. *California*, 386 U. S. 18, 24 (1967). In this case, we conclude that the "minds of an average jury" would not have found the State's case significantly less persuasive had the testimony as to Snell's admissions been excluded. The admission into evidence of these statements, therefore, was at most harmless error.

Affirmed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

This is a capital case in which the petitioner was convicted of murder. When the case was last before us, we vacated the conviction and remanded for further consideration in light of *Bruton* v. *United States*, 391 U. S. 123 (1968). See *Schneble* v. *Florida*, 392 U. S. 298 (1968). On remand, the Supreme Court of Florida reaffirmed

the conviction, holding that it was not "inconsistent with Bruton." While *Bruton* itself received an extensive factual analysis by the State Supreme Court, little attention was paid to the facts of the instant case and no reasons were proffered in support of the holding that *Bruton* was not violated. In today's opinion the Court rejects the Florida Supreme Court's conclusion that this case can be squared with *Bruton* and concludes that *Bruton* was violated when the statement of a nontestifying codefendant implicating petitioner in the crime charged was introduced at trial. Yet, the conviction is permitted to stand because the *Bruton* violation is viewed as "harmless error" within the meaning of *Chapman* v. *California,* 386 U. S. 18, 24 (1967). I dissent.

Determining whether or not a constitutional infirmity at trial is harmless error is ordinarily a difficult task. This case is easier than most, because it is impossible to read the record and to conclude that the evidence so "overwhelmingly" establishes petitioner's guilt that the admission of the codefendant's statement made no difference to the outcome.

The Court relies on *Harrington* v. *California,* 395 U. S. 250 (1969), to support its conclusion, but that case is inapposite. In *Harrington,* the Court found harmless error where statements of two nontestifying codefendants were introduced at trial to demonstrate Harrington's presence at the scene of the crime. That decision was limited to a factual setting in which the defendant admits being at the scene, and the improperly admitted statements of the codefendants are merely cumulative evidence. I most urgently protest the extension of that case to these facts.

It is true that prior to trial petitioner confessed to murdering the victim. But, it is also true that when he was first arrested, petitioner denied his guilt and

placed the full blame on his codefendant. He also denied being present when the murder was committed. Only after he was subjected to a series of bizarre acts by the police designed to frighten him into making incriminating statements did petitioner "confess." The full spectrum of events leading up to the confession is set out in detail in the first opinion of the Supreme Court of Florida, 201 So. 2d 881, 884–885 (1967).

Petitioner moved to suppress the statements that he made to the police on the ground that they were the direct result of police coercion. Recognizing that the police acted improperly in attempting to obtain a statement from Schneble, the Florida Supreme Court upheld the trial court's finding that the incriminating statements were made in circumstances sufficiently attenuated from the coercive activities as to remove the taint. Our limited grant of certiorari does not permit review of this ruling. But, the limited nature of the grant does not bar us from looking at the entire record in the case in order to dispose of the one issue presented.

Before the trial judge permitted the jury to hear testimony regarding petitioner's incriminating statements, he made the initial determination that those statements were voluntary as required by *Jackson* v. *Denno*, 378 U. S. 368 (1964). He subsequently instructed the jury in the following manner:

> "Should you find from the evidence that any alleged statement or confession as to any defendant was not freely and voluntarily made, or if you have a reasonable doubt in this regard, then you must disregard the same, as well as any other item of evidence that may have been discovered by the State by reason of such alleged statement of [*sic*] confession." (Tr. 561.)

We have no way of knowing what judgment the jury made with respect to the voluntariness of petitioner's

statements. In my opinion, there is clearly enough evidence to support either a finding of voluntariness or one of coercion. Since an error cannot be harmless if there is a reasonable possibility that it contributed to a finding of guilt, all reasonable inferences that might be drawn from the evidence must be drawn in favor of the defendant, since the jury may very well have made just these inferences. Thus, we can assume that the jury found petitioner's incriminating statements to be involuntary.

We must also assume that the jury followed the instructions of the court and disregarded not only the statements themselves, but all the evidence "that may have been discovered by the State by reason of such . . . statement[s] . . . ." It is possible that the jury may have found the statements to be involuntary and still relied on them. See *Jackson* v. *Denno, supra.* But, it is by no means certain that the jury did not meticulously follow the instructions of the trial judge. See *Lego* v. *Twomey,* 404 U. S. 477 (1972). Since either assumption may be made, we must again choose the assumption favorable to the defendant in order to insure that any error was harmless.

Assuming, then, that the jury completely disregarded petitioner's incriminating statements and all evidence derived therefrom, little evidence remains to support the verdict. Only the statement of the codefendant places petitioner at the scene of the crime at the relevant time. Without this statement, it is difficult to believe that anyone could be convinced of petitioner's guilt beyond a reasonable doubt.

The Court asserts, however, that "we must determine on the basis of 'our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of an average jury,' . . . whether Snell's [the codefendant's] admissions were sufficiently

prejudicial to petitioner as to require reversal." The Court concludes that "the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to Snell's admissions been excluded."

The mistake the Court makes is in assuming that the jury accepted as true all of the other evidence. The case turns on this assumption, and as demonstrated above, it is clearly erroneous. The jury was given the duty of making an independent determination of the admissibility of petitioner's incriminating statements and their fruits. In light of the evidence with respect to coercive police activities, we cannot say with even a minimal degree of certainty that the jury did not find the statements involuntary and that it did not choose to disregard them and almost all of the other evidence in the case which was derived from those statements. We also cannot be certain that the jury did not base its verdict primarily on the statement of the codefendant. See *Malinski* v. *New York*, 324 U. S. 401, 404 (1945); cf. *Rogers* v. *Richmond*, 365 U. S. 534 (1961) (Frankfurter, J.).

The Court would assume that the jury must have found petitioner's statements to be voluntary and therefore admissible along with their fruits, because the other evidence was insufficient to support a conviction. This assumption is erroneous for several reasons. First, the jury may have found that some of petitioner's statements were involuntary and some were voluntary. The "voluntary" statements may have been connected with the codefendant's statement to support the conviction, while standing alone they may have been insufficient to support a guilty verdict. Second, the jury may have found that the statements were all involuntary but that some evidence remained free from any taint. Whereas the Court indicates that if the statements were involun-

tary, then all the other evidence in the case except the codefendant's statement must be suppressed as a matter of law, the jury was given only a general instruction on suppression and may, incorrectly and unwittingly, have more narrowly circumscribed the taint. The codefendant's statement bolstered any other evidence considered by the jury. Third, the jury may have found the statements to be involuntary and ignored all the evidence that the Court says should have been ignored. The jury may then have convicted on insufficient circumstantial evidence, including the codefendant's statement. We need ascribe no malevolence here; we need only recognize that humans err. Indeed, the very notion of "harmless error" should constantly remind us of that.* Any one of these things is a reasonable possibility, and despite the apparent certainty with which the Court affirms the decision below, there remains a deep and haunting doubt as to whether a constitutional violation contributed to the conviction.

In light of these uncertainties I find it impossible to perceive how the Court can conclude that the violation of *Bruton* was harmless error. It is significant that the Florida Supreme Court did not find harmless error in this case. Unless the Court intends to emasculate *Bruton, supra,* or to overrule *Chapman* v. *California, supra, sub silentio,* then I submit that its decision is clearly wrong.

**Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957), cited by the Court to support the proposition that we do not lightly infer irrational jury behavior had nothing whatever to do with a criminal case generally or with "harmless error" in particular. That case dealt with the proper function of judge and jury in Federal Employers' Liability Act cases. It never considered whether reversal was required when evidence was admitted in violation of the Constitution. *Rogers* was, in short, a case involving the sufficiency of the evidence. In such cases we draw precisely the opposite inferences as drawn in "harmless error" cases.

EISENSTADT, SHERIFF *v.* BAIRD

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 70–17. Argued November 17–18, 1971—Decided March 22, 1972

Appellee attacks his conviction of violating Massachusetts law for giving a woman a contraceptive foam at the close of his lecture to students on contraception. That law makes it a felony for anyone to give away a drug, medicine, instrument, or article for the prevention of conception except in the case of (1) a registered physician administering or prescribing it for a married person or (2) an active registered pharmacist furnishing it to a married person presenting a registered physician's prescription. The District Court dismissed appellee's petition for a writ of habeas corpus. The Court of Appeals vacated the dismissal, holding that the statute is a prohibition on contraception *per se* and conflicts "with fundamental human rights" under *Griswold* v. *Connecticut*, 381 U. S. 479. Appellant, *inter alia*, argues that appellee lacks standing to assert the rights of unmarried persons denied access to contraceptives because he was neither an authorized distributor under the statute nor a single person unable to obtain contraceptives. *Held:*

1. If, as the Court of Appeals held, the statute under which appellee was convicted is not a health measure, appellee may not be prevented, because he was not an authorized distributor, from attacking the statute in its alleged discriminatory application to potential distributees. Appellee, furthermore, has standing to assert the rights of unmarried persons denied access to contraceptives because their ability to obtain them will be materially impaired by enforcement of the statute. Cf. *Griswold, supra; Barrows* v. *Jackson*, 346 U. S. 249. Pp. 443–446.

2. By providing dissimilar treatment for married and unmarried persons who are similarly situated, the statute violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 446–455.

(a) The deterrence of fornication, a 90-day misdemeanor under Massachusetts law, cannot reasonably be regarded as the purpose of the statute, since the statute is riddled with exceptions making contraceptives freely available for use in premarital sexual

relations and its scope and penalty structure are inconsistent with that purpose. Pp. 447–450.

(b) Similarly, the protection of public health through the regulation of the distribution of potentially harmful articles cannot reasonably be regarded as the purpose of the law, since, if health were the rationale, the statute would be both discriminatory and overbroad, and federal and state laws already regulate the distribution of drugs unsafe for use except under the supervision of a licensed physician. Pp. 450–452.

(c) Nor can the statute be sustained simply as a prohibition on contraception *per se*, for whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike. If under *Griswold*, *supra*, the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible, since the constitutionally protected right of privacy inheres in the individual, not the marital couple. If, on the other hand, *Griswold* is no bar to a prohibition on the distribution of contraceptives, a prohibition limited to unmarried persons would be underinclusive and invidiously discriminatory. Pp. 452–455.

429 F. 2d 1398, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, and MARSHALL, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post*, p. 455. WHITE, J., filed an opinion concurring in the result, in which BLACKMUN, J., joined, *post*, p. 460. BURGER, C. J., filed a dissenting opinion, *post*, p. 465. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Joseph R. Nolan, Special Assistant Attorney General of Massachusetts, argued the cause for appellant. With him on the brief were *Robert H. Quinn*, Attorney General, *John J. Irwin, Jr.*, and *Ruth I. Abrams*, Assistant Attorneys General, and *Garrett H. Byrne*.

Joseph D. Tydings argued the cause for appellee. With him on the briefs was *Joseph J. Balliro*.

Briefs of *amici curiae* urging affirmance were filed by *Harriet F. Pilpel* and *Nancy F. Wechsler* for the

Planned Parenthood Federation of America, Inc.; by *Roger P. Stokey* for the Planned Parenthood League of Massachusetts; by *Melvin L. Wulf* for the American Civil Liberties Union et al.; and by *Sylvia S. Ellison* for Human Rights for Women, Inc.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court under Massachusetts General Laws Ann., c. 272, § 21, first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address.[1] The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird's First Amendment rights, but by a four-to-three vote sustained the conviction for giving away the foam. *Commonwealth* v. *Baird,* 355 Mass. 746, 247 N. E. 2d 574 (1969). Baird subsequently filed a petition for a federal writ of habeas corpus, which the District Court dismissed. 310 F. Supp. 951 (1970). On appeal, however, the Court of Appeals for the First Circuit vacated the dismissal and remanded the action with directions to grant the writ discharging Baird. 429 F. 2d 1398 (1970). This appeal by the Sheriff of Suffolk County, Massachusetts, followed, and we noted probable jurisdiction. 401 U. S. 934 (1971). We affirm.

Massachusetts General Laws Ann., c. 272, § 21, under which Baird was convicted, provides a maximum five-year term of imprisonment for "whoever . . . gives away . . . any drug, medicine, instrument or article whatever

[1] The Court of Appeals below described the recipient of the foam as "an unmarried adult woman." 429 F. 2d 1398, 1399 (1970). However, there is no evidence in the record about her marital status.

for the prevention of conception," except as authorized in § 21A. Under § 21A, "[a] registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. [And a] registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician." [2] As interpreted by the State Supreme Judicial

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[2] Section 21 provides in full:

"Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

Section 21A provides in full:

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

Court, these provisions make it a felony for anyone, other than a registered physician or pharmacist acting in accordance with the terms of § 21A, to dispense any article with the intention that it be used for the prevention of conception. The statutory scheme distinguishes among three distinct classes of distributees—*first*, married persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; *second*, single persons may not obtain contraceptives from anyone to prevent pregnancy; and, *third*, married or single persons may obtain contraceptives from anyone to prevent, not pregnancy, but the spread of disease. This construction of state law is, of course, binding on us. *E. g., Groppi* v. *Wisconsin*, 400 U. S. 505, 507 (1971).

The legislative purposes that the statute is meant to serve are not altogether clear. In *Commonwealth* v. *Baird, supra*, the Supreme Judicial Court noted only the State's interest in protecting the health of its citizens: "[T]he prohibition in § 21," the court declared, "is directly related to" the State's goal of "preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences." 355 Mass., at 753, 247 N. E. 2d, at 578. In a subsequent decision, *Sturgis* v. *Attorney General*, 358 Mass. 37, —, 260 N. E. 2d 687, 690 (1970), the court, however, found "a second and more compelling ground for upholding the statute"—namely, to protect morals through "regulating the private sexual lives of single persons." [3] The Court of Appeals, for reasons that will

[3] Appellant suggests that the purpose of the Massachusetts statute is to promote marital fidelity as well as to discourage premarital sex. Under § 21A, however, contraceptives may be made available to married persons without regard to whether they are living with their spouses or the uses to which the contraceptives are to be put. Plainly the legislation has no deterrent effect on extramarital sexual relations.

appear, did not consider the promotion of health or the protection of morals through the deterrence of fornication to be the legislative aim. Instead, the court concluded that the statutory goal was to limit contraception in and of itself—a purpose that the court held conflicted "with fundamental human rights" under *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), where this Court struck down Connecticut's prohibition against the use of contraceptives as an unconstitutional infringement of the right of marital privacy. 429 F. 2d, at 1401–1402.

We agree that the goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims of §§ 21 and 21A. And we hold that the statute, viewed as a prohibition on contraception *per se,* violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.

I

We address at the outset appellant's contention that Baird does not have standing to assert the rights of unmarried persons denied access to contraceptives because he was neither an authorized distributor under § 21A nor a single person unable to obtain contraceptives. There can be no question, of course, that Baird has sufficient interest in challenging the statute's validity to satisfy the "case or controversy" requirement of Article III of the Constitution.[4] Appellant's argument, however, is that

[4] This factor decisively distinguishes *Tileston* v. *Ullman,* 318 U. S. 44 (1943), where the Court held that a physician lacked standing to bring an action for declaratory relief to challenge, on behalf of his patients, the Connecticut law prohibiting the use of contraceptives. The patients were fully able to bring their own action. Underlying the decision was the concern that "the standards of 'case or controversy' in Article III of the Constitution [not] become blurred," *Griswold* v. *Connecticut,* 381 U. S. 479, 481 (1965)—a problem that is not at all involved in this case.

this case is governed by the Court's self-imposed rules of restraint, *first*, that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional," *United States* v. *Raines*, 362 U. S. 17, 21 (1960), and, *second*, the "closely related corollary that a litigant may only assert his own constitutional rights or immunities," *id.*, at 22. Here, appellant contends that Baird's conviction rests on the restriction in § 21A on permissible distributors and that that restriction serves a valid health interest independent of the limitation on authorized distributees. Appellant urges, therefore, that Baird's action in giving away the foam fell squarely within the conduct that the legislature meant and had power to prohibit and that Baird should not be allowed to attack the statute in its application to potential recipients. In any event, appellant concludes, since Baird was not himself a single person denied access to contraceptives, he should not be heard to assert their rights. We cannot agree.

The Court of Appeals held that the statute under which Baird was convicted is not a health measure. If that view is correct, we do not see how Baird may be prevented, because he was neither a doctor nor a druggist, from attacking the statute in its alleged discriminatory application to potential distributees. We think, too, that our self-imposed rule against the assertion of third-party rights must be relaxed in this case just as in *Griswold* v. *Connecticut*, *supra*. There the Executive Director of the Planned Parenthood League of Connecticut and a licensed physician who had prescribed contraceptives for married persons and been convicted as accessories to the crime of using contraceptives were held to have standing to raise the constitutional rights of the patients with whom they had a professional relationship.

Appellant here argues that the absence of a professional or aiding-and-abetting relationship distinguishes this case from *Griswold.* Yet, as the Court's discussion of prior authority in *Griswold,* 381 U. S., at 481, indicates, the doctor-patient and accessory-principal relationships are not the only circumstances in which one person has been found to have standing to assert the rights of another. Indeed, in *Barrows* v. *Jackson,* 346 U. S. 249 (1953), a seller of land was entitled to defend against an action for damages for breach of a racially restrictive covenant on the ground that enforcement of the covenant violated the equal protection rights of prospective non-Caucasian purchasers. The relationship there between the defendant and those whose rights he sought to assert was not simply the fortuitous connection between a vendor and potential vendees, but the relationship between one who acted to protect the rights of a minority and the minority itself. Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599, 631 (1962). And so here the relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so. The very point of Baird's giving away the vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives.

In any event, more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests.[5] In *Griswold,* 381 U. S., at 481, the

[5] Indeed, in First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech. *E. g., Thornhill* v. *Alabama,* 310 U. S. 88, 97–98 (1940). See *United States* v. *Raines,* 362 U. S. 17, 22 (1960).

Court stated: "The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." A similar situation obtains here. Enforcement of the Massachusetts statute will materially impair the ability of single persons to obtain contraceptives. In fact, the case for according standing to assert third-party rights is stronger in this regard here than in *Griswold* because unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights. Cf. *NAACP* v. *Alabama,* 357 U. S. 449 (1958); *Barrows* v. *Jackson, supra.*[6] The Massachusetts statute, unlike the Connecticut law considered in *Griswold,* prohibits, not use, but distribution.

For the foregoing reasons we hold that Baird, who is now in a position, and plainly has an adequate incentive, to assert the rights of unmarried persons denied access to contraceptives, has standing to do so. We turn to the merits.

II

The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar. As THE CHIEF JUSTICE only recently explained in *Reed* v. *Reed,* 404 U. S. 71, 75–76 (1971):

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment

[6] See also *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), where a custodian, in violation of state law, furnished a child with magazines to distribute on the streets. The Court there implicitly held that the custodian had standing to assert alleged freedom of religion and equal protection rights of the child that were threatened in the very litigation before the Court and that the child had no effective way of asserting herself.

> does not deny to States the power to treat different classes of persons in different ways. *Barbier* v. *Connolly,* 113 U. S. 27 (1885); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61 (1911); *Railway Express Agency* v. *New York,* 336 U. S. 106 (1949); *McDonald* v. *Board of Election Commissioners,* 394 U. S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415 (1920)."

The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under Massachusetts General Laws Ann., c. 272, §§ 21 and 21A.[7] For the reasons that follow, we conclude that no such ground exists.

First. Section 21 stems from Mass. Stat. 1879, c. 159, § 1, which prohibited, without exception, distribution of articles intended to be used as contraceptives. In *Commonwealth* v. *Allison,* 227 Mass. 57, 62, 116 N. E. 265,

[7] Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold,* the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest. *E. g., Shapiro* v. *Thompson,* 394 U. S. 618 (1969); *Loving* v. *Virginia,* 388 U. S. 1 (1967). But just as in *Reed* v. *Reed,* 404 U. S. 71 (1971), we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard.

266 (1917), the Massachusetts Supreme Judicial Court explained that the law's "plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women." Although the State clearly abandoned that purpose with the enactment of § 21A, at least insofar as the illicit sexual activities of married persons are concerned, see n. 3, *supra*, the court reiterated in *Sturgis* v. *Attorney General*, *supra*, that the object of the legislation is to discourage premarital sexual intercourse. Conceding that the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as "[e]vils . . . of different dimensions and proportions, requiring different remedies," *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955), we cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of the Massachusetts law.

It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor under Massachusetts General Laws Ann., c. 272, § 18. Aside from the scheme of values that assumption would attribute to the State, it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective. What Mr. Justice Goldberg said in *Griswold* v. *Connecticut*, *supra*, at 498 (concurring opinion), concerning the effect of Connecticut's prohibition on the use of contraceptives in discouraging extramarital sexual relations, is equally applicable here. "The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the

prevention of disease, as distinguished from the prevention of conception." See also *id.*, at 505–507 (WHITE, J., concurring in judgment). Like Connecticut's laws, §§ 21 and 21A do not at all regulate the distribution of contraceptives when they are to be used to prevent, not pregnancy, but the spread of disease. *Commonwealth* v. *Corbett,* 307 Mass. 7, 29 N. E. 2d 151 (1940), cited with approval in *Commonwealth* v. *Baird,* 355 Mass., at 754, 247 N. E. 2d, at 579. Nor, in making contraceptives available to married persons without regard to their intended use, does Massachusetts attempt to deter married persons from engaging in illicit sexual relations with unmarried persons. Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim.

Moreover, §§ 21 and 21A on their face have a dubious relation to the State's criminal prohibition on fornication. As the Court of Appeals explained, "Fornication is a misdemeanor [in Massachusetts], entailing a thirty dollar fine, or three months in jail. Massachusetts General Laws Ann. c. 272 § 18. Violation of the present statute is a felony, punishable by five years in prison. We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor." 429 F. 2d, at 1401. Even conceding the legislature a full measure of discretion in fashioning means to prevent fornication, and recognizing that the State may seek to deter prohibited conduct by punishing more severely those who facilitate than those who actually engage in its commission, we, like the Court of Appeals, cannot believe that in this instance Massachusetts has chosen to expose the aider and abetter who simply *gives away* a contraceptive to

20 times the *90-day* sentence of the offender himself. The very terms of the State's criminal statutes, coupled with the *de minimis* effect of §§ 21 and 21A in deterring fornication, thus compel the conclusion that such deterrence cannot reasonably be taken as the purpose of the ban on distribution of contraceptives to unmarried persons.

Second. Section 21A was added to the Massachusetts General Laws by Stat. 1966, c. 265, § 1. The Supreme Judicial Court in *Commonwealth* v. *Baird, supra,* held that the purpose of the amendment was to serve the health needs of the community by regulating the distribution of potentially harmful articles. It is plain that Massachusetts had no such purpose in mind before the enactment of § 21A. As the Court of Appeals remarked, "Consistent with the fact that the statute was contained in a chapter dealing with 'Crimes Against Chastity, Morality, Decency and Good Order,' it was cast only in terms of morals. A physician was forbidden to prescribe contraceptives even when needed for the protection of health. Commonwealth v. Gardner, 1938, 300 Mass. 372, 15 N. E. 2d 222." 429 F. 2d, at 1401. Nor did the Court of Appeals "believe that the legislature [in enacting § 21A] suddenly reversed its field and developed an interest in health. Rather, it merely made what it thought to be the precise accommodation necessary to escape the *Griswold* ruling." *Ibid.*

Again, we must agree with the Court of Appeals. If health were the rationale of § 21A, the statute would be both discriminatory and overbroad. Dissenting in *Commonwealth* v. *Baird,* 355 Mass., at 758, 247 N. E. 2d, at 581, Justices Whittemore and Cutter stated that they saw "in § 21 and § 21A, read together, no public health purpose. If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons."

The Court of Appeals added: "If the prohibition [on distribution to unmarried persons] . . . is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality." 429 F. 2d, at 1401.[8] Furthermore, we must join the Court of Appeals in noting that not all contraceptives are potentially dangerous.[9] As a result, if the Massachusetts statute were a health measure, it would not only invidiously discriminate against the unmarried, but also be overbroad with respect to the married, a fact that the Supreme Judicial Court itself seems to have conceded in *Sturgis* v. *Attorney General,* 358 Mass., at —, 260 N. E. 2d, at 690, where it noted that "it may well be that certain contraceptive medication and devices constitute no hazard to health, in which event it could be argued that the statute swept too broadly in its prohibition." "In this posture," as the Court of

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[8] Appellant insists that the unmarried have no right to engage in sexual intercourse and hence no health interest in contraception that needs to be served. The short answer to this contention is that the same devices the distribution of which the State purports to regulate when their asserted purpose is to forestall pregnancy are available without any controls whatsoever so long as their asserted purpose is to prevent the spread of disease. It is inconceivable that the need for health controls varies with the purpose for which the contraceptive is to be used when the physical act in all cases is one and the same.

[9] The Court of Appeals stated, 429 F. 2d, at 1401:

"[W]e must take notice that not all contraceptive devices risk 'undesirable . . . [or] dangerous physical consequences.' It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a 'redingote anglais.' The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products."

Appeals concluded, "it is impossible to think of the statute as intended as a health measure for the unmarried, and it is almost as difficult to think of it as so intended even as to the married." 429 F. 2d, at 1401.

But if further proof that the Massachusetts statute is not a health measure is necessary, the argument of Justice Spiegel, who also dissented in *Commonwealth* v. *Baird*, 355 Mass., at 759, 247 N. E. 2d, at 582, is conclusive: "It is at best a strained conception to say that the Legislature intended to prevent the distribution of articles 'which may have undesirable, if not dangerous, physical consequences.' If that was the Legislature's goal, § 21 is not required" in view of the federal and state laws *already* regulating the distribution of harmful drugs. See Federal Food, Drug, and Cosmetic Act, § 503, 52 Stat. 1051, as amended, 21 U. S. C. § 353; Mass. Gen. Laws Ann., c. 94, § 187A, as amended. We conclude, accordingly, that, despite the statute's superficial earmarks as a health measure, health, on the face of the statute, may no more reasonably be regarded as its purpose than the deterrence of premarital sexual relations.

Third. If the Massachusetts statute cannot be upheld as a deterrent to fornication or as a health measure, may it, nevertheless, be sustained simply as a prohibition on contraception? The Court of Appeals analysis "led inevitably to the conclusion that, so far as morals are concerned, it is contraceptives per se that are considered immoral—to the extent that *Griswold* will permit such a declaration." 429 F. 2d, at 1401–1402. The Court of Appeals went on to hold, *id.*, at 1402:

> "To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and

> for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state."

We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See *Stanley* v. *Georgia,* 394 U. S. 557 (1969).[10] See also *Skinner* v. *Okla-*

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[10] In *Stanley,* 394 U. S., at 564, the Court stated:

"[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

" 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government,

homa, 316 U. S. 535 (1942); *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29 (1905).

On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious. Mr. Justice Jackson, concurring in *Railway Express Agency* v. *New York*, 336 U. S. 106, 112–113 (1949), made the point:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

Although Mr. Justice Jackson's comments had reference to administrative regulations, the principle he affirmed has equal application to the legislation here. We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, Massa-

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the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.' *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

"See *Griswold* v. *Connecticut*, *supra*; cf. *NAACP* v. *Alabama*, 357 U. S. 449, 462 (1958)."

chusetts General Laws Ann., c. 272, §§ 21 and 21A, violate the Equal Protection Clause. The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, there is for me a narrower ground for affirming the Court of Appeals. This to me is a simple First Amendment case, that amendment being applicable to the States by reason of the Fourteenth. *Stromberg* v. *California,* 283 U. S. 359.

Under no stretch of the law as presently stated could Massachusetts require a license for those who desire to lecture on planned parenthood, contraceptives, the rights of women, birth control, or any allied subject, or place a tax on that privilege. As to license taxes on First Amendment rights we said in *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115:

> "A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

We held in *Thomas* v. *Collins,* 323 U. S. 516, that a person speaking at a labor union rally could not be required to register or obtain a license:

> "As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights

of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.

. . . . . .

". . . If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." *Id.*, at 539, 540.

Baird addressed an audience of students and faculty at Boston University on the subject of birth control and overpopulation. His address was approximately one hour in length and consisted of a discussion of various contraceptive devices displayed by means of diagrams on two demonstration boards, as well as a display of contraceptive devices in their original packages. In addition, Baird spoke of the respective merits of various contraceptive devices; overpopulation in the world; crises throughout the world due to overpopulation; the large number of abortions performed on unwed mothers; and quack abortionists and the potential harm to women resulting from abortions performed by quack abortionists. Baird also urged members of the audience to petition the Massachusetts Legislature and to make known their feel-

ings with regard to birth control laws in order to bring about a change in the laws. At the close of the address Baird invited members of the audience to come to the stage and help themselves to the contraceptive articles. We do not know how many accepted Baird's invitation. We only know that Baird personally handed one woman a package of Emko Vaginal Foam. He was then arrested and indicted (1) for exhibiting contraceptive devices and (2) for giving one such device away. The conviction for the first offense was reversed, the Supreme Judicial Court of Massachusetts holding that the display of the articles was essential to a graphic representation of the lecture. But the conviction for the giving away of one article was sustained. 355 Mass. 746, 247 N. E. 2d 574. The case reaches us by federal habeas corpus.

Had Baird not "given away" a sample of one of the devices whose use he advocated, there could be no question about the protection afforded him by the First Amendment. A State may not "contract the spectrum of available knowledge." *Griswold* v. *Connecticut*, 381 U. S. 479, 482. See also *Thomas* v. *Collins, supra; Pierce* v. *Society of Sisters*, 268 U. S. 510; *Meyer* v. *Nebraska*, 262 U. S. 390. However noxious Baird's ideas might have been to the authorities, the freedom to learn about them, fully to comprehend their scope and portent, and to weigh them against the tenets of the "conventional wisdom," may not be abridged. *Terminiello* v. *Chicago*, 337 U. S. 1. Our system of government requires that we have faith in the ability of the individual to decide wisely, if only he is fully apprised of the merits of a controversy.

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U. S. 88, 102.

The teachings of Baird and those of Galileo might be

of a different order; but the suppression of either is equally repugnant.

As Milton said in the Areopagitica, "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."

It is said that only Baird's conduct is involved and *United States* v. *O'Brien*, 391 U. S. 367, is cited. That case involved a registrant under the Selective Service Act burning his Selective Service draft card. When prosecuted for that act, he defended his conduct as "symbolic speech." The Court held it was not.

Whatever may be thought of that decision on the merits,[1] *O'Brien* is not controlling here. The distinction between "speech" and "conduct" is a valid one, insofar as it helps to determine in a particular case whether the purpose of the activity was to aid in the communication of ideas, and whether the form of the communication so interferes with the rights of others that reasonable regulations may be imposed.[2] See *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 467 (DOUGLAS, J., dissenting).

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[1] I have earlier expressed my reasons for believing that the *O'Brien* decision was not consistent with First Amendment rights. See *Brandenburg* v. *Ohio*, 395 U. S. 444, 455 (concurring opinion).

[2] In *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, the Court upheld a state court injunction against peaceful picketing carried on in violation of a state "anti-restraint-of-trade" law. *Giboney*, however, is easily distinguished from the present case. Under the circumstances there present, "There was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making [state antitrust] policy a dead letter . . . . They were exercising their economic power together with that of their allies to *compel* Empire to abide by union rather than by state regulation of trade." *Id.*, at 503 (footnote omitted; emphasis supplied). There is no such coercion in the instant case nor is there a similar frustration of state policy, see text at n. 4, *infra*. For an analysis of the state policies underlying the Massachusetts statute which Baird was convicted of having violated, see Dienes, The Progeny of Comstockery—Birth Control Laws Return to Court, 21 Am. U. L. Rev. 1, 3–44 (1971).

Thus, excessive noise might well be "conduct"—a form of pollution—which can be made subject to precise, narrowly drawn regulations. See *Adderley* v. *Florida,* 385 U. S. 39, 54 (DOUGLAS, J., dissenting). But "this Court has repeatedly stated, [First Amendment] rights are not confined to verbal expression. They embrace appropriate types of action . . . ." *Brown* v. *Louisiana,* 383 U. S. 131, 141–142.

Baird gave an hour's lecture on birth control and as an aid to understanding the ideas which he was propagating he handed out one sample of one of the devices whose use he was endorsing. A person giving a lecture on coyote-getters would certainly improve his teaching technique if he passed one out to the audience; and he would be protected in doing so unless of course the device was loaded and ready to explode, killing or injuring people. The same holds true in my mind for mousetraps, spray guns, or any other article not dangerous *per se* on which speakers give educational lectures.

It is irrelevant to the application of these principles that Baird went beyond the giving of information about birth control and advocated the use of contraceptive articles. The First Amendment protects the opportunity to persuade to action whether that action be unwise or immoral, or whether the speech incites to action. See, *e. g.*, *Brandenburg* v. *Ohio,* 395 U. S. 444; *Edwards* v. *South Carolina,* 372 U. S. 229; *Terminiello* v. *Chicago, supra.*

In this case there was not even incitement to action.[3] There is no evidence or finding that Baird intended that the young lady take the foam home with her when he handed it to her or that she would not have examined the

[3] Even under the restrictive meaning which the Court has given the First Amendment, as applied to the States by the Fourteenth, advocacy of law violation is permissible "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio, supra,* n. 1, at 447.

article and then returned it to Baird, had he not been placed under arrest immediately upon handing the article over.[4]

First Amendment rights are not limited to verbal expression.[5] The right to petition often involves the right to walk. The right of assembly may mean pushing or jostling. Picketing involves physical activity as well as a display of a sign. A sit-in can be a quiet, dignified protest that has First Amendment protection even though no speech is involved, as we held in *Brown* v. *Louisiana, supra.* Putting contraceptives on display is certainly an aid to speech and discussion. Handing an article under discussion to a member of the audience is a technique known to all teachers and is commonly used. A handout may be on such a scale as to smack of a vendor's marketing scheme. But passing one article to an audience is merely a projection of the visual aid and should be a permissible adjunct of free speech. Baird was not making a prescription nor purporting to give medical advice. Handing out the article was not even a suggestion that the lady use it. At most it suggested that she become familiar with the product line.

I do not see how we can have a Society of the Dialogue, which the First Amendment envisages, if time-honored teaching techniques are barred to those who give educational lectures.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, concurring in the result.

In *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), we reversed criminal convictions for advising married per-

[4] This factor alone would seem to distinguish *O'Brien, supra,* as that case turned on the Court's judgment that O'Brien's "conduct" frustrated a substantial governmental interest.

[5] For a partial collection of cases involving action that comes under First Amendment protection see *Brandenburg* v. *Ohio, supra,* n. 1, at 455–456 (concurring opinion).

sons with respect to the use of contraceptives. As there applied, the Connecticut law, which forbade using contraceptives or giving advice on the subject, unduly invaded a zone of marital privacy protected by the Bill of Rights. The Connecticut law did not regulate the manufacture or sale of such products and we expressly left open any question concerning the permissible scope of such legislation. 381 U. S., at 485.

Chapter 272, § 21, of the Massachusetts General Laws makes it a criminal offense to distribute, sell, or give away any drug, medicine, or article for the prevention of conception. Section 21A excepts from this prohibition registered physicians who prescribe for and administer such articles to married persons and registered pharmacists who dispense on medical prescription.[1]

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[1] Section 21 provides as follows:

"Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

Section 21A makes these exceptions:

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish infor-

Appellee Baird was indicted for giving away Emko Vaginal Foam, a "medicine and article for the prevention of conception . . . ." [2] The State did not purport to charge or convict Baird for distributing to an unmarried person. No proof was offered as to the marital status of the recipient. The gravamen of the offense charged was that Baird had no license and therefore no authority to distribute to anyone. As the Supreme Judicial Court of Massachusetts noted, the constitutional validity of Baird's conviction rested upon his lack of status as a "distributor and not . . . the marital status of the recipient." *Commonwealth* v. *Baird*, 355 Mass. 746, 753, 247 N. E. 2d 574, 578 (1969). The Federal District Court was of the same view.[3]

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mation to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

[2] The indictment states:

"The Jurors for the Commonwealth of Massachusetts on their oath present that William R. Baird, on the sixth day of April, in the year of our Lord one thousand nine hundred and sixty-seven, did unlawfully give away a certain medicine and article for the prevention of conception, to wit: Emko Vaginal Foam, the giving away of the said medicine and article by the said William R. Baird not being in accordance with, or authorized or permitted by, the provisions of Section 21A of Chapter 272, of the General Laws of the said Commonwealth."

[3] "Had § 21A authorized registered physicians to administer or prescribe contraceptives for unmarried as well as for married persons, the legal position of the petitioner would not have been in any way altered. Not being a physician he would still have been prohibited by § 21 from 'giving away' the contraceptive." 310 F. Supp. 951, 954 (Mass. 1970).

I assume that a State's interest in the health of its citizens empowers it to restrict to medical channels the distribution of products whose use should be accompanied by medical advice. I also do not doubt that various contraceptive medicines and articles are properly available only on prescription, and I therefore have no difficulty with the Massachusetts court's characterization of the statute at issue here as expressing "a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences." *Id.*, at 753, 247 N. E. 2d, at 578. Had Baird distributed a supply of the so-called "pill," I would sustain his conviction under this statute.[4] Requiring a prescription to obtain potentially dangerous contraceptive material may place a substantial burden upon the right recognized in *Griswold,* but that burden is justified by a strong state interest and does not, as did the statute at issue in *Griswold,* sweep unnecessarily broadly or seek "to achieve its goals by means having a maximum destructive impact upon" a protected relationship. *Griswold* v. *Connecticut,* 381 U. S., at 485.

Baird, however, was found guilty of giving away vaginal foam. Inquiry into the validity of this conviction does not come to an end merely because some contraceptives are harmful and their distribution may be restricted. Our general reluctance to question a State's judgment on matters of public health must give way where, as here, the restriction at issue burdens the con-

[4] The Food and Drug Administration has made a finding that birth control pills pose possible hazards to health. It therefore restricts distribution and receipt of such products in interstate commerce to properly labeled packages that must be sold pursuant to a prescription. 21 CFR § 130.45. A violation of this law is punishable by imprisonment for one year, a fine of not more than $10,000, or both. 21 U. S. C. §§ 331, 333.

stitutional rights of married persons to use contraceptives. In these circumstances we may not accept on faith the State's classification of a particular contraceptive as dangerous to health. Due regard for protecting constitutional rights requires that the record contain evidence that a restriction on distribution of vaginal foam is essential to achieve the statutory purpose, or the relevant facts concerning the product must be such as to fall within the range of judicial notice.

Neither requirement is met here. Nothing in the record even suggests that the distribution of vaginal foam should be accompanied by medical advice in order to protect the user's health. Nor does the opinion of the Massachusetts court or the State's brief filed here marshal facts demonstrating that the hazards of using vaginal foam are common knowledge or so incontrovertible that they may be noticed judicially. On the contrary, the State acknowledges that Emko is a product widely available without prescription. Given *Griswold* v. *Connecticut*, *supra*, and absent proof of the probable hazards of using vaginal foam, we could not sustain appellee's conviction had it been for selling or giving away foam to a married person. Just as in *Griswold*, where the right of married persons to use contraceptives was "diluted or adversely affected" by permitting a conviction for giving advice as to its exercise, *id.*, at 481, so here, to sanction a medical restriction upon distribution of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right.

That Baird could not be convicted for distributing Emko to a married person disposes of this case. Assuming, *arguendo*, that the result would be otherwise had the recipient been unmarried, nothing has been placed in the record to indicate her marital status. The State has maintained that marital status is irrelevant because an unlicensed person cannot legally dispense vaginal foam

either to married or unmarried persons. This approach is plainly erroneous and requires the reversal of Baird's conviction; for on the facts of this case, it deprives us of knowing whether Baird was in fact convicted for making a constitutionally protected distribution of Emko to a married person.

The principle established in *Stromberg* v. *California,* 283 U. S. 359 (1931), and consistently adhered to is that a conviction cannot stand where the "record fail[s] to prove that the conviction was not founded upon a theory which could not constitutionally support a verdict." *Street* v. *New York,* 394 U. S. 576, 586 (1969). To uphold a conviction even "though we cannot know that it did not rest on the invalid constitutional ground . . . would be to countenance a procedure which would cause a serious impairment of constitutional rights." *Williams* v. *North Carolina,* 317 U. S. 287, 292 (1942).

Because this case can be disposed of on the basis of settled constitutional doctrine, I perceive no reason for reaching the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried. Cf. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring).

MR. CHIEF JUSTICE BURGER, dissenting.

The judgment of the Supreme Judicial Court of Massachusetts in sustaining appellee's conviction for dispensing medicinal material without a license seems eminently correct to me and I would not disturb it. It is undisputed that appellee is not a physician or pharmacist and was prohibited under Massachusetts law from dispensing contraceptives to anyone, regardless of marital status. To my mind the validity of this restriction on dispensing medicinal substances is the only issue before the Court,

and appellee has no standing to challenge that part of the statute restricting the persons to whom contraceptives are available. There is no need to labor this point, however, for everyone seems to agree that if Massachusetts has validly required, as a health measure, that all contraceptives be dispensed by a physician or pursuant to a physician's prescription, then the statutory distinction based on marital status has no bearing on this case. *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

The opinion of the Court today brushes aside appellee's status as an unlicensed layman by concluding that the Massachusetts Legislature was not really concerned with the protection of health when it passed this statute. MR. JUSTICE WHITE acknowledges the statutory concern with the protection of health, but finds the restriction on distributors overly broad because the State has failed to adduce facts showing the health hazards of the particular substance dispensed by appellee as distinguished from other contraceptives. MR. JUSTICE DOUGLAS' concurring opinion does not directly challenge the power of Massachusetts to prohibit laymen from dispensing contraceptives, but considers that appellee rather than dispensing the substance was resorting to a "time-honored teaching technique" by utilizing a "visual aid" as an adjunct to his protected speech. I am puzzled by this third characterization of the case. If the suggestion is that appellee was merely displaying the contraceptive material without relinquishing his ownership of it, then the argument must be that the prosecution failed to prove that appellee had "given away" the contraceptive material. But appellee does not challenge the sufficiency of the evidence, and himself summarizes the record as showing that "at the close of his lecture he invited members of the audience . . . to come and help themselves." On the other hand, if the concurring opinion means that the First Amendment protects the distribu-

tion of all articles "not dangerous *per se*" when the distribution is coupled with some form of speech, then I must confess that I have misread certain cases in the area. See, *e. g., United States* v. *O'Brien,* 391 U. S. 367, 376 (1968); *Cox* v. *Louisiana,* 379 U. S. 536, 555 (1965); *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 502 (1949).

My disagreement with the opinion of the Court and that of MR. JUSTICE WHITE goes far beyond mere puzzlement, however, for these opinions seriously invade the constitutional prerogatives of the States and regrettably hark back to the heyday of substantive due process.

In affirming appellee's conviction, the highest tribunal in Massachusetts held that the statutory requirement that contraceptives be dispensed only through medical channels served the legitimate interest of the State in protecting the health of its citizens. The Court today blithely hurdles this authoritative state pronouncement and concludes that the statute has no such purpose. Three basic arguments are advanced: First, since the distribution of contraceptives was prohibited as a moral matter in Massachusetts prior to 1966, it is impossible to believe that the legislature was concerned with health when it lifted the complete ban but insisted on medical supervision. I fail to see why the historical predominance of an unacceptable legislative purpose makes incredible the emergence of a new and valid one.[1] See *McGowan*

[1] The Court places some reliance on the opinion of the Supreme Judicial Court of Massachusetts in *Sturgis* v. *Attorney General,* 358 Mass. —, 260 N. E. 2d 687 (1970), to show that § 21A is intended to regulate morals rather than public health. In *Sturgis* the state court rejected a challenge by a group of physicians to that part of the statute prohibiting the distribution of contraceptives to unmarried women. The court accepted the State's interest in "regulating the private sexual lives of single persons," that interest being expressed in the restriction on distributees. *Id.,* at —, 260 N. E. 2d, at 690. The purpose of the restriction on distributors was not in issue.

v. *Maryland*, 366 U. S. 420, 445–449 (1961). The second argument, finding its origin in a dissenting opinion in the Supreme Judicial Court of Massachusetts, rejects a health purpose because, "[i]f there is need to have a physician prescribe . . . contraceptives, that need is as great for unmarried persons as for married persons." 355 Mass. 746, 758, 247 N. E. 2d 574, 581. This argument confuses the validity of the restriction on distributors with the validity of the further restriction on distributees, a part of the statute not properly before the Court. Assuming the legislature too broadly restricted the class of persons who could obtain contraceptives, it hardly follows that it saw no need to protect the health of all persons to whom they are made available. Third, the Court sees no health purpose underlying the restriction on distributors because other state and federal laws regulate the distribution of harmful drugs. I know of no rule that all enactments relating to a particular purpose must be neatly consolidated in one package in the statute books for, if so, the United States Code will not pass muster. I am unable to draw any inference as to legislative purpose from the fact that the restriction on dispensing contraceptives was not codified with other statutory provisions regulating the distribution of medicinal substances. And the existence of nonconflicting, nonpre-emptive federal laws is simply without significance in judging the validity or purpose of a state law on the same subject matter.

It is possible, of course, that some members of the Massachusetts Legislature desired contraceptives to be dispensed only through medical channels in order to minimize their use, rather than to protect the health of their users, but I do not think it is the proper function of this Court to dismiss as dubious a state court's explication of a state statute absent overwhelming and irrefutable reasons for doing so.

MR. JUSTICE WHITE, while acknowledging a valid legislative purpose of protecting health, concludes that the State lacks power to regulate the distribution of the contraceptive involved in this case as a means of protecting health.[2] The opinion grants that appellee's conviction would be valid if he had given away a potentially harmful substance, but rejects the State's placing this particular contraceptive in that category. So far as I am aware, this Court has never before challenged the police power of a State to protect the public from the risks of possibly spurious and deleterious substances sold within its borders. Moreover, a statutory classification is not invalid

> "simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitary fiat." *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 204 (1912).

But since the Massachusetts statute seeks to protect health by regulating contraceptives, the opinion invokes *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), and puts the statutory classification to an unprecedented test: either the record must contain evidence supporting the classification or the health hazards of the particular contraceptive must be judicially noticeable. This is indeed a novel constitutional doctrine and not surprisingly no authority is cited for it.

Since the potential harmfulness of this particular medicinal substance has never been placed in issue in the

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[2] The opinion of the Court states in passing that if the restriction on distributors were in fact intended as a health measure, it would be overly broad. Since the Court does not develop this argument in detail, my response is addressed solely to the reasoning in the opinion of MR. JUSTICE WHITE, concurring in the result.

state or federal courts, the State can hardly be faulted for its failure to build a record on this point. And it totally mystifies me why, in the absence of some evidence in the record, the factual underpinnings of the statutory classification must be "incontrovertible" or a matter of "common knowledge."

The actual hazards of introducing a particular foreign substance into the human body are frequently controverted, and I cannot believe that unanimity of expert opinion is a prerequisite to a State's exercise of its police power, no matter what the subject matter of the regulation. Even assuming no present dispute among medical authorities, we cannot ignore that it has become commonplace for a drug or food additive to be universally regarded as harmless on one day and to be condemned as perilous on the next. It is inappropriate for this Court to overrule a legislative classification by relying on the present consensus among leading authorities. The commands of the Constitution cannot fluctuate with the shifting tides of scientific opinion.

Even if it were conclusively established once and for all that the product dispensed by appellee is not actually or potentially dangerous in the somatic sense, I would still be unable to agree that the restriction on dispensing it falls outside the State's power to regulate in the area of health. The choice of a means of birth control, although a highly personal matter, is also a health matter in a very real sense, and I see nothing arbitrary in a requirement of medical supervision.[3] It is generally acknowledged that contraceptives vary in degree of effec-

[3] For general discussions of the need for medical supervision before choosing a means of birth control, see Manual of Family Planning and Contraceptive Practice 47–53 (M. Calderone ed. 1970); Advanced Concepts in Contraception 22–24 (F. Hoffman & R. Kleinman ed. 1968).

tiveness and potential harmfulness.[4] There may be compelling health reasons for certain women to choose the most effective means of birth control available, no matter how harmless the less effective alternatives.[5] Others might be advised not to use a highly effective means of contraception because of their peculiar susceptibility to an adverse side effect.[6] Moreover, there may be information known to the medical profession that a particular brand of contraceptive is to be preferred or avoided, or that it has not been adequately tested. Nonetheless, the concurring opinion would hold, as a constitutional matter, that a State must allow someone without medical training the same power to distribute this medicinal substance as is enjoyed by a physician.

It is revealing, I think, that those portions of the majority and concurring opinions rejecting the statutory limitation on distributors rely on no particular provision of the Constitution. I see nothing in the Fourteenth Amendment or any other part of the Constitu-

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[4] See U. S. Commission on Population Growth and the American Future, Population and the American Future, pt. II, pp. 38–39 (Mar. 16, 1972); Manual of Family Planning, *supra*, at 268–274, 316, 320, 342, 346; Jaffe, Toward the Reduction of Unwanted Pregnancy, 174 Science 119, 121 (Oct. 8, 1971); G. Hardin, Birth Control 128 (1970); E. Havemann, Birth Control (1967). The contraceptive substance dispensed by appellee, vaginal foam, is thought to be between 70% and 80% effective. See Jaffe, *supra*, at 121; Dingle & Tietze, Comparative Study of Three Contraceptive Methods, 85 Amer. J. Obst. & Gyn. 1012, 1021 (1963). The birth control pill, by contrast, is thought to be better than 99% effective. See Havemann, Birth Control, *supra*.

[5] See Perkin, Assessment of Reproductive Risk in Nonpregnant Women—A Guide to Establishing Priorities for Contraceptive Care, 101 Amer. J. Obst. & Gyn. 709 (1968).

[6] See Manual of Family Planning, *supra*, at 301, 332–333, 336–340.

tion that even vaguely suggests that these medicinal forms of contraceptives must be available in the open market. I do not challenge *Griswold* v. *Connecticut, supra,* despite its tenuous moorings to the text of the Constitution, but I cannot view it as controlling authority for this case. The Court was there confronted with a statute flatly prohibiting the use of contraceptives, not one regulating their distribution. I simply cannot believe that the limitation on the class of lawful distributors has significantly impaired the right to use contraceptives in Massachusetts. By relying on *Griswold* in the present context, the Court has passed beyond the penumbras of the specific guarantees into the uncircumscribed area of personal predilections.

The need for dissemination of information on birth control is not impinged in the slightest by limiting the distribution of medicinal substances to medical and pharmaceutical channels as Massachusetts has done by statute. The appellee has succeeded, it seems, in cloaking his activities in some new permutation of the First Amendment although his conviction rests in fact and law on dispensing a medicinal substance without a license. I am constrained to suggest that if the Constitution can be strained to invalidate the Massachusetts statute underlying appellee's conviction, we could quite as well employ it for the protection of a "curbstone quack," reminiscent of the "medicine man" of times past, who attracted a crowd of the curious with a soapbox lecture and then plied them with "free samples" of some unproved remedy. Massachusetts presumably outlawed such activities long ago, but today's holding seems to invite their return.

Syllabus

LOPER *v.* BETO, CORRECTIONS DIRECTOR, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70–5388. Argued January 13, 1972—Decided March 22, 1972

For the purpose of impeaching petitioner's credibility, the prosecutor in petitioner's 1947 rape trial was permitted to interrogate him about his previous criminal record. Petitioner admitted four felony convictions during the period 1931–1940. He was found guilty by the jury and was sentenced to a term of 50 years. He filed a petition for habeas corpus in Federal District Court alleging that the previous convictions were constitutionally invalid under *Gideon* v. *Wainwright*, 372 U. S. 335, because he had been denied the assistance of counsel. The District Court denied relief and the Court of Appeals affirmed, stating that the "fact that there are possible infirmities in the evidence does not necessarily raise an issue of constitutional proportions which would require reversal." *Held:* The judgment is vacated and the case is remanded to the Court of Appeals for further proceedings. Pp. 480–485.

440 F. 2d 934, vacated and remanded.

MR. JUSTICE STEWART, joined by MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL, concluded that the use of convictions constitutionally invalid under *Gideon* v. *Wainwright, supra,* to impeach a defendant's credibility deprives him of due process of law. Pp. 480–483.

MR. JUSTICE WHITE concluded that although the Court of Appeals erred, on remand that court does not necessarily have to set petitioner's conviction aside. There remain unresolved issues: whether petitioner was represented by counsel at his earlier trials and, if not, whether he waived counsel; and the possibility of a finding of harmless error, all of which should be considered in the first instance by the lower court. P. 485.

STEWART, J., announced the Court's judgment and delivered an opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. WHITE, J., filed an opinion concurring in the result, *post*, p. 485. BURGER, C. J., filed a dissenting opinion, in which POWELL, J., joined,

post, p. 485. BLACKMUN, J., filed a dissenting opinion, *post*, p. 494. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN and POWELL, JJ., joined, *post*, p. 497.

John T. Cabaniss, by appointment of the Court, 404 U. S. 954, argued the cause for petitioner. With him on the brief was *Dan G. Matthews*.

Robert Darden, Assistant Attorney General of Texas, argued the cause for respondents. With him on the brief were *Crawford C. Martin*, Attorney General, *Nola White*, First Assistant Attorney General, *Alfred Walker*, Executive Assistant Attorney General, and *Robert C. Flowers*, Assistant Attorney General.

MR. JUSTICE STEWART announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join.

The petitioner, Otis Loper, was brought to trial in a Texas criminal court in 1947 upon a charge of statutory rape. The alleged victim, Loper's 8-year-old stepdaughter, was the only witness who identified him as the perpetrator of the crime. The sole witness for the defense was Loper himself, who testified that he had not assaulted the victim in any way. For the purpose of impeaching Loper's credibility, the prosecutor was permitted on cross-examination to interrogate Loper about his previous criminal record. In response to this line of questioning, Loper admitted in damaging detail to four previous felony convictions during the period 1931–1940, three in Mississippi and one in Tennessee.[1]

[1] "Q. During the past ten years how many times have you been indicted and convicted in this State or any other State for a felony?

"A. About twice in the past ten years.

"Q. How about on May 7th, 1940, weren't you arrested . . .

"MR. LETTS: Your honor, I object to that, as to his being arrested, as that is not admissible in this case.

[*Footnote 1 continued on p. 475*]

At the conclusion of the one-day trial the jury found Loper guilty as charged and sentenced him to a term of 50 years in prison.

"THE COURT: Well, let him finish the question, Mr. Letts.

"Q. All right, On May 7th, 1940, what were you indicted and convicted for?

"A. Burglary.

"Q. Where was that?

"A. Carthage, Mississippi.

"Q. What did you get for that?

"A. Five years in the penitentiary.

"Q. On January 15th, 1935, what were you indicted and convicted for then?

"A. Burglary.

"MR. LETTS: We object, your honor, as that has been over ten years.

. . . . .

"Q. What were you indicted, tried and convicted for then on January 15th, 1935, in Brushy Mountain Parish, Petros, Tennessee?

"A. Burglary.

"Q. What did you get for that?

"A. Four years.

"Q. How about October 27th, 1931, what . . .

"MR. LETTS: Your honor, we object to that and ask the Court to instruct the jury not to consider it. That reaches way back to 1931 and the Court knows it would prejudice and inflame the minds of the jury in this case.

"THE COURT: Objection over-ruled.

. . . . .

"Q. Where were you arrested on November 29th, 1934?

"A. In Chattanooga, Tennessee.

"Q. What about October 27th, 1931, what were you convicted for in Parchman, Mississippi, then?

"A. Burglary.

"Q. What did you get for that?

"A. Six months, I think.

"Q. There have been so many offenses you have committed that you can't remember them straight, can you?

"MR. LETTS: We object to that remark, your honor.

"THE COURT: Objection sustained.

[*Footnote 1 continued on p. 476*]

Loper initiated the present habeas corpus proceeding in the United States District Court for the Southern District of Texas in 1969. He alleged, among other things, that the previous convictions used to impeach his credibility at the trial were constitutionally invalid under *Gideon* v. *Wainwright*, 372 U. S. 335, because he had been denied the assistance of counsel in the Mississippi and Tennessee courts that had convicted him.[2]

"Q. It was for burglary in 1931?

"A. Yes.

"Q. Have you always gone by the name of Otis Loper?

"A. Not always.

"Q. What other names have you gone by?

"A. Milton Cummings.

"Q. That was in Mississippi, wasn't it?

"A. Yes sir.

"Q. What were you indicted and tried for on that case in Mississippi in 1932?

"A. Burglary.

"Q. How much time did you get on that conviction?

"A. Two years.

"Q. And that was under the name of Milton Cummings?

"A. Yes.

"Q. And that is 4 times that you have been convicted of burglary, a felony?

"A. Yes.

"MR. DUGGAN: That's all, no more questions."

[2] Loper's petition was originally dismissed by the District Court, but the Court of Appeals vacated the dismissal and remanded for an evidentiary hearing on the question whether Loper had been deprived of his right to appeal from the Texas judgment of conviction. 383 F. 2d 400. On remand, the District Judge, noting that Loper had filed numerous habeas corpus petitions over a period of 20 years, appointed counsel to represent Loper and directed him to raise any points that "conceivably might be raised in his behalf," in order that a single evidentiary hearing could serve to put an end to postconviction litigation in Loper's case. Loper, with the assistance of counsel, then advanced six claims, and the evidentiary hearing was directed to resolving all six contentions. The claim at issue here had not been raised in any of Loper's previous petitions.

His sworn testimony at the habeas corpus hearing confirmed these allegations.[3] In addition, he produced court

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[3] "Q. Were you convicted in 1931 of burglary in Scott County, Mississippi?

"A. Yes, sir.

"Q. How old were you at this time?

"A. I don't remember, but I believe I was around 17 years, something around that age. I'm not for sure.

"Q. Were you represented by an attorney in connection with that proceeding?

"A. No, sir, I didn't have an attorney.

"Q. Were you advised that you had a right to an attorney whether you could afford one or not?

"A. No, sir.

"Q. Did you know that you were entitled to one whether you could afford one or not?

"A. No, sir.

"Q. Did you inform the court that you did not want to be represented by an attorney?

"A. No, sir.

"Q. Were you convicted in that proceeding?

"A. Yes, sir.

"Q. Were you convicted, Mr. Loper, of burglary in 1940 in Leake County, Mississippi?

"A. Yes, sir.

"Q. How old were you at the time that occurred?

"A. I believe I was about 25 or 26, I don't remember for sure.

"Q. Let me ask you one more question about that Scott County, Mississippi, conviction. Did you plead guilty or not guilty?

"A. I plead guilty.

"Q. Were you sentenced to a term in prison?

"A. Yes, sir.

"Q. All right, sir. Now, in connection with the 1940 conviction, were you represented by an attorney?

"A. No, sir.

"Q. At any stage of the proceedings?

"A. No, sir.

"Q. Were you advised that you had a right to an attorney whether you could afford one or not?

[*Footnote 3 continued on p. 478*]

records to corroborate this testimony.[4] The District Court denied habeas corpus relief, placing "little or no credence" in Loper's testimony, and holding that in any event "the question does not rise to constitutional stature and is not subject to collateral attack." [5]

On appeal, the Court of Appeals for the Fifth Circuit

"A. No, sir.

"Q. Could you in fact afford one?

"A. I don't believe I could have then.

"Q. What about 1931, the conviction in Scott County, Mississippi, could you have afforded an attorney?

"A. I couldn't have, no, sir.

"Q. Did you know in connection with the 1940 proceeding that you were entitled to be represented by counsel whether you could afford it or not?

"A. No, sir.

"Q. Did you inform the court that you did not want to be represented by an attorney?

"A. No, sir.

"Q. Was the 1940 proceeding in Leake County, Mississippi, did you plead guilty or not guilty?

"A. Not guilty.

"Q. Was a trial held?

"A. Yes, sir.

"Q. Who conducted the defense in that trial?

"A. Well, there wasn't anybody. I just didn't know what to ask the people. I didn't know anything about how to.

"Q. Did you conduct your own trial?

"A. As far as it was conducted, yes, sir.

"Q. Why did you attempt to do so yourself?

"A. Well, I didn't have an attorney, and nobody to help me. I didn't want to plead guilty to it."

[4] A certified record of the 1940 proceeding in Leake County, Mississippi, recited that Loper appeared "in his own proper person." A certified copy of the 1935 proceeding in Hamilton County, Tennessee, recited that Loper appeared "in person." A certified copy of the 1931 proceeding in Scott County, Mississippi, recited simply that Loper and his codefendants "entered pleas of guilty, as charged in the indictment." No record was introduced of the 1932 conviction in Mississippi.

[5] The memorandum and order of the District Court are unreported.

affirmed the judgment of the District Court. Although recognizing "the force of Loper's argument to the effect that such convictions may have impaired his credibility in the minds of the jury as a witness in his own behalf," the appellate court held that "the use of such convictions as evidence for purposes of impeachment which goes only to credibility, is not nearly so serious as the use of a conviction for enhancement, which may add years of imprisonment to the sentence of a defendant. . . . The issue presented raises an evidentiary question. The fact that there are possible infirmities in the evidence does not necessarily raise an issue of constitutional proportions which would require reversal." 440 F. 2d 934, 937.[6]

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[6] A dissenting opinion, *post*, at 502, implies that the District Court found that the petitioner did not meet his burden of proving that he had not waived his right to counsel in the Mississippi and Tennessee courts. But no such finding appears in the record. The District Court did say that "there is no evidence other than petitioner's own statement *that he was not represented by counsel* at the time of his prior convictions, which evidence, as stated above, I decline to accept as credible." (Emphasis added.) This statement is wholly incorrect, for Loper did introduce documentary evidence to corroborate his testimony that he had not been represented by counsel on at least two of his prior convictions. See n. 4, *supra*. Nowhere in the District Court's opinion is there any finding of fact as to whether Loper might have *waived* counsel. And the fact that the challenged convictions occurred at a time when, under our decisions, state courts were under no constitutional obligation to provide lawyers to indigent defendants in all felony cases, would make any such finding highly unrealistic, in the face of the documentary evidence and the petitioner's uncontradicted testimony. For, at the time of the petitioner's previous convictions, there was no known constitutional right to be "waived."

Moreover, the judgment that we review today is not that of the District Court, but of the Court of Appeals. That court stated:

"The convictions mentioned have been of record for a number of years, yet the record before us does not disclose that any attack has ever been made upon those convictions. Except for the assertions of Loper the record fails to furnish any conclusive information

We limited our grant of certiorari to a single constitutional question, worded as follows in the petition for certiorari: Does the use of prior, void convictions for impeachment purposes deprive a criminal defendant of due process of law where their use might well have influenced the outcome of the case? 404 U. S. 821. This is a recurring question that has received conflicting answers in the United States Courts of Appeals.[7] It is a question that has also divided state appellate courts.[8]

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as to the facts and circumstances surrounding his former convictions. So far as the record before us reveals, there are outstanding, unchallenged, state court convictions of felonies in the States of Mississippi and Tennessee. . . . [I]f the convictions possessed the infirmities which Loper claims, he has failed to make any effort to set them aside for over 30 years. No one else could have done so. Surely such an attack was available to him in view of the retroactive application of the *Gideon* decision which was decided over six years prior to the hearing under review." 440 F. 2d, at 937.

But despite these observations, the Court of Appeals, perhaps recognizing the error in the statement of the District Court quoted above, did not rest its decision on a finding that the petitioner had failed to meet his burden of proving the invalidity of the prior convictions. It reached the merits of the legal question involved, and we granted certiorari to review that decision. There is thus no basis in the record upon which we may either dismiss this case or affirm the decision below on the ground that the petitioner did not meet his burden of proving that the prior convictions were invalid. See *Burgett* v. *Texas*, 389 U. S. 109, 114–115; *Losieau* v. *Sigler*, 406 F. 2d 795, 803; *Williams* v. *Coiner*, 392 F. 2d 210, 212–213.

The dissenting opinion relies upon our decision last Term in *Kitchens* v. *Smith*, 401 U. S. 847. Yet we held in that case that the petitioner on collateral review had sufficiently "proved he was without counsel due to indigency at the time of his [1944] conviction," even though, unlike the present case, the petitioner "introduced no evidence other than his own testimony." *Id.*, at 849.

[7] Compare the decisions in this case and in *Walker* v. *Follette*, 443 F. 2d 167 (CA2 1971), with *Gilday* v. *Scafati*, 428 F. 2d 1027 (CA1 1970); *Tucker* v. *United States*, 431 F. 2d 1292 (CA9 1970); and *Howard* v. *Craven*, 446 F. 2d 586 (CA9 1971).

[8] *Simmons* v. *State*, 456 S. W. 2d 66 (Ct. Crim. App. Tex. 1970), holds that prior convictions obtained without the benefit of counsel

The starting point in considering this question is, of course, *Gideon* v. *Wainwright,* 372 U. S. 335. In that case the Court unanimously announced a clear and simple constitutional rule: In the absence of waiver, a felony conviction is invalid if it was obtained in a court that denied the defendant the help of a lawyer.[9]

The Court dealt with a sequel to *Gideon* in *Burgett* v. *Texas,* 389 U. S. 109. There a Texas indictment charging the petitioner with assault contained allegations of previous felony convictions, that, if proved, would have increased the punishment for assault under the state recidivist statutes. The indictment was read to the jury at the beginning of the trial. Records of two of the previous convictions were offered in evidence during the course of the trial, and it appeared that at least one of these convictions had been obtained in violation of *Gideon.* In reversing the Texas judgment, the Court said:

> "To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that . . . right." 389 U. S., at 115.

Earlier this Term we had before us a case in which it appeared that previous convictions obtained in viola-

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may nevertheless be used for the purpose of impeachment. Most reported state decisions, however, hold the contrary. See *Spaulding* v. *State,* 481 P. 2d 389 (Alaska 1971); *In re Dabney,* 71 Cal. 2d 1, 452 P. 2d 924 (1969); *Johnson* v. *State,* 9 Md. App. 166, 263 A. 2d 232 (1970); *White* v. *State,* 11 Md. App. 423, 274 A. 2d 671 (1971); *Subilosky* v. *Commonwealth,* — Mass. —, 265 N. E. 2d 80 (1970) (semble).

[9] This constitutional rule is wholly retroactive. *Pickelsimer* v. *Wainwright,* 375 U. S. 2; *Kitchens* v. *Smith,* 401 U. S. 847.

tion of *Gideon* had played a part in the determination of the length of a convicted defendant's prison sentence. *United States* v. *Tucker*, 404 U. S. 443. We there ruled that the Court of Appeals for the Ninth Circuit had been correct in holding that the teaching of *Burgett* required a remand of the case to the trial court for resentencing.

The *Tucker* case involved only that aspect of *Burgett* that prohibits the use of invalid prior convictions to "enhance punishment." The case now before us involves the use of such convictions "to support guilt." [10] For the issue of innocence or guilt in this case turned entirely on whether the jury would believe the testimony of an 8-year-old girl or that of Loper. And the sole purpose for which the prior convictions were permitted to be used was to destroy the credibility of Loper's testimony in the eyes of the jury.[11]

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[10] Under Texas law at the time, the jury, upon finding Loper guilty, was authorized in its absolute and unreviewable discretion to impose any punishment from five years in prison to death in the electric chair. Texas Pen. Code, Art. 1189 (1948). Thus, bringing the prior convictions to the attention of the jury may well also have served to enhance Loper's punishment.

[11] This is not a case where the record of a prior conviction was used for the purpose of directly rebutting a specific false statement made from the witness stand. Cf. *Walker* v. *Follette*, 443 F. 2d 167, and see *Harris* v. *New York*, 401 U. S. 222; *Walder* v. *United States*, 347 U. S. 62. The previous convictions were used, rather, simply in an effort to convict Loper by blackening his character and thus damaging his general credibility in the eyes of the jury.

That a record of prior convictions may actually do more than simply impeach a defendant's credibility has been often noted. See, *e. g.*, C. McCormick, Evidence § 43, p. 93 (1954):

"The sharpest and most prejudicial impact of the practice of impeachment by conviction . . . is upon one particular type of witness, namely, the accused in a criminal case who elects to take the stand. If the accused is forced to admit that he has a 'record' of past convictions, particularly if they are for crimes similar to the one on

Unless *Burgett* is to be forsaken, the conclusion is inescapable that the use of convictions constitutionally invalid under *Gideon* v. *Wainwright* to impeach a defendant's credibility deprives him of due process of law.[12] We can put the matter no better than in the words of the Court of Appeals for the First Circuit:

> "We conclude that the *Burgett* rule against use of uncounseled convictions 'to prove guilt' was intended to prohibit their use 'to impeach credibility,' for the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not prove, guilt. Even if such prohibition was not originally contemplated, we fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt." *Gilday* v. *Scafati*, 428 F. 2d 1027, 1029.

A dissenting opinion filed today suggests that our decision presses the "sound doctrine of retroactivity beyond the outer limits of its logic." On the contrary, our decision in this case follows directly from the rationale under which *Gideon* v. *Wainwright*, *supra*, was given retroactive application. We have said that the principle

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trial, the danger is obvious that the jury, despite instructions, will give more heed to the past convictions as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concern with present guilt, than they will to its legitimate bearing on credibility."

[12] In the circumstances of this case there is little room for a finding of harmless error, if, as appears on the record now before us, Loper was unrepresented by counsel and did not waive counsel at the time of the earlier convictions. Cf. *Subilosky* v. *Moore*, 443 F. 2d 334; *Tucker* v. *United States*, 431 F. 2d 1292; *Gilday* v. *Scafati*, 428 F. 2d 1027.

established in *Gideon* goes to "the very integrity of the fact-finding process" in criminal trials, and that a conviction obtained after a trial in which the defendant was denied the assistance of a lawyer "lacked reliability." *Linkletter* v. *Walker*, 381 U. S. 618, 639 and n. 20. Loper has "suffered anew" from this unconstitutional deprivation, *Burgett* v. *Texas*, *supra*, regardless of whether the prior convictions were used to impeach him before or after the *Gideon* decision. It would surely be unreasonable, as one dissenting opinion suggests, to expect the judge at Loper's trial to have anticipated *Gideon*, just as it would have been unreasonable to have expected the judge at Gideon's trial to have foreseen our later decision in that case. But a necessary result of applying any decision retroactively is to invalidate rulings made by trial judges that were correct under the law prevailing at the time the judges made them.[13] If the retroactivity of *Gideon* is "sound," then this case cannot be decided under the ill-starred and discredited doctrine of *Betts* v. *Brady*, 316 U. S. 455.

The judgment before us is set aside, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

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[13] The reasoning of that dissenting opinion would dictate that the rule in *Burgett* must not be given retroactive application, at least to cases where the sentence was imposed prior to *Gideon*. Yet, by our disposition of *Bates* v. *Nelson*, 393 U. S. 16, where we vacated and remanded in light of *Burgett* a denial of habeas corpus following a 1957 conviction, we indicated that *Burgett* is retroactive in its application without regard to whether the use of the prior convictions was made prior to or after *Gideon*. Every federal court that has considered the question has held *Burgett* retroactive, and none has made the distinction suggested by the dissenting opinion. See, *e. g.*, *Walker* v. *Follette*, 443 F. 2d 167 (CA2 1971); *Losieau* v. *Sigler*, 406 F. 2d 795 (CA8 1969); *Tucker* v. *Craven*, 421 F. 2d 139 (CA9 1970); *Oswald* v. *Crouse*, 420 F. 2d 373 (CA10 1969).

MR. JUSTICE WHITE, concurring in the result.

The Court of Appeals affirmed the denial of Loper's petition for habeas corpus, reasoning that the use of invalid prior convictions to impeach a defendant in a criminal case does not raise an issue of constitutional proportions even though so using those convictions might well have influenced the outcome of the case. It was on that issue that we granted certiorari; and as our past cases now stand, I agree with MR. JUSTICE STEWART that the Court of Appeals' reasons for affirming the District Court were erroneous. This judgment, however, does not necessarily mean that Loper's conviction must be set aside. There remain issues, unresolved by the Court of Appeals, as to whether the challenged prior convictions were legally infirm: was Loper represented by counsel at the time of the earlier convictions; if not, did he waive counsel? These matters are best considered in the first instance by the Court of Appeals. The same is true with respect to the legal significance of the lack of proof with respect to the validity of one or more of the prior convictions used for impeachment purposes at Loper's trial. In this connection, I do not understand our prior decisions to hold that there is no room in cases such as this for a finding of harmless error; and if this case is ultimately to turn on whether there was harmless error or not, I would prefer to have the initial judgment of the lower court.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE POWELL joins, dissenting.

In 1942 this Court, in deciding *Betts* v. *Brady,* 316 U. S. 455, held that the Due Process Clause of the Fourteenth Amendment did not call for the setting aside of a robbery conviction that had been entered against an indigent defendant whose request for appointed coun-

sel had been denied by the state trial court. *Betts* was overruled in 1963 by *Gideon* v. *Wainwright*, 372 U. S. 335. Loper's trial for rape was held five years after *Betts* and 16 years before *Gideon*. Yet the Court today holds that an error of constitutional magnitude occurred when the judge presiding at Loper's trial failed to make, on his own motion, an *evidentiary ruling* that would have been inconsistent both with state law and with the United States Constitution as then explicitly interpreted by this Court. I dissent.

(1)

Three witnesses were called at Loper's 1947 trial. His eight-year-old stepdaughter testified that Loper raped her on August 9, 1947. A physician gave testimony corroborating that the child had been raped. Loper himself denied having committed the act, but admitted that there was a period of time during the day in question when he was at home alone with his stepdaughter and his four-month-old baby boy; he further admitted on cross-examination that his stepdaughter was, as far as he knew, a truthful child.

Under further cross-examination, Loper admitted to four prior burglary convictions entered against him in 1931, 1932, 1935, and 1940, respectively. At the 1969 habeas corpus proceeding here under review, Loper introduced court records relating to three of these burglary convictions and gave testimony relating to two of those three. The evidence presented to the District Court with respect to the four convictions may be summarized as follows:

> (a) The court records for the 1931 conviction indicated only that Loper pleaded guilty upon being arraigned and that a six-month sentence was imposed nine days later. Loper testified before the District Court that he was not represented by an

attorney in connection with these 1931 proceedings; that he could not then have afforded private counsel; and that he never informed the trial court that he did not want to be represented by counsel.

(b) Loper introduced no court record and gave no testimony at all with respect to his 1932 conviction.

(c) Loper gave no testimony with respect to his 1935 conviction, but the court record of that conviction appears on its face to suggest that he was represented by counsel: "Came the Attorney General and the defendant in person, and this case was tried . . . before the Court and the . . . jury . . . [whose members,] having heard the proof, *arguments of Counsel* and the charge of the Court[,] on oath say defendant is guilty . . . ." (Emphasis added.)

(d) The court record of Loper's 1940 conviction recited that Loper appeared "in his own proper person." Loper testified before the District Court that he did not have counsel at his 1940 trial; that he did not "believe" he could then have afforded private counsel; and that he never informed the state court that he did not want to be represented by counsel.

Even if we, unlike the District Court,[1] treat as absolutely true everything to which Loper testified at the habeas corpus hearing, there is no basis on which we can conclude that he was not represented by counsel in the proceedings leading to his 1932 and 1935 convictions. With respect to the 1940 conviction, it surely cannot be said that Loper, through his testimony that he does

[1] The District Court, after observing Loper and hearing him testify, stated that "petitioner has made false statements under oath, and has testified to a set of facts so roundly and thoroughly shown to be false by unimpeachable evidence that little or no credence may be placed in his own testimony . . . ."

not now "believe" that he then could have afforded private counsel, met his "burden of proving his inability at that time to hire an attorney." *Kitchens* v. *Smith*, 401 U. S. 847, 848 (1971). There is no basis, then, for a retroactive application of *Gideon* v. *Wainwright* to bring into question the validity of his 1940 burglary conviction.

It thus appears that of the four convictions introduced to impeach Loper's credibility at his 1947 rape trial, only the burglary conviction of 1931—a conviction entered upon Loper's plea of guilty—can reasonably be found on this record to have been even arguably invalid under *Gideon*.

(2)

When a defendant in a criminal trial elects to testify on his own behalf, he asks the jury, in effect, to believe his testimony rather than any conflicting testimony introduced by the prosecution. He presents himself to the jury as a person worthy of belief. In so doing, he brings into issue his credibility as a witness, and he thereby exposes himself to possible cross-examination designed to impeach that credibility. Such cross-examination is limited by state rules of evidence, of course, to matters which are relevant to credibility and which are not, at the same time, so prejudicial to the defendant that they must be excluded despite their relevance. Each State's rules governing such cross-examination reflect a balance that has been struck by that State in weighing, with respect to a given category of evidence, its probative value for impeachment purposes against the prejudicial effect it might have upon the jury's determination of the defendant's guilt or innocence of the crime charged.[2]

[2] Cf. *Michelson* v. *United States*, 335 U. S. 469 (1948), where this Court was called upon to strike a somewhat similar balance with respect to cross-examination designed to impeach the credibility of

The plurality opinion concludes that the Due Process Clause was violated if one or more of the prior convictions used to impeach Loper's credibility, even though fully valid under *Betts* v. *Brady*—the prevailing law when Loper was tried in 1947—was rendered constitutionally infirm by *Gideon*. The plurality opinion does not make clear, however, whether evidence of any such convictions is considered to be so lacking in probative value as to violate due process or to be so prejudicial as to do so. If its conclusion were grounded solely on a consideration of undue prejudice, the rationale underlying today's decision would be elusive indeed. There is no suggestion in the record that the jury might have failed to follow the instructions given by the trial judge that consideration of these prior convictions was to be restricted solely to the issue of Loper's credibility. Nor can any plausible contention be made that a jury has more difficulty following such instructions when it is dealing with an uncounseled conviction than when it is dealing with a counseled one.

It must be, then, that the conclusion of the plurality opinion is based upon the view that it is fundamentally unfair for a jury to be allowed to treat an uncounseled conviction, introduced to impeach a defendant, as though it had the probative value of a counseled conviction. Under this view, jurors who are told of a prior uncounseled conviction are misled in regard to a matter of *fact;*

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character witnesses who claim to be familiar with a defendant's reputation in the community. The Court held that when a defendant in a federal trial puts his character in evidence by calling such witnesses, the government may cross-examine those witnesses to determine whether they are aware of any prior arrests that may be on the defendant's record and that may consequently have affected his reputation. The Court reasoned that, despite the possibility of prejudice, "[t]o hold otherwise would give defendant the benefit of testimony that he was honest and law-abiding *in reputation* when such might not be the fact . . . ." *Id.*, at 484 (emphasis added).

i. e., by being told merely that the defendant was in fact previously convicted of a felony, they are misled into believing that he was *duly* convicted when, under a retroactive application of *Gideon*, he in fact was not duly convicted. I cannot agree that such a view justifies a finding here that it was fundamentally unfair of the trial judge at Loper's 1947 rape trial to fail to make an evidentiary ruling, on his own motion, that he could have justified only by anticipating by 16 years this Court's overruling of *Betts* v. *Brady* in 1963. Not even the wisest member of this Court could have hazarded that prediction in 1947.

The plurality opinion, of course, does not analyze the case in these terms. It merely concludes, under a rigidly mechanistic approach, that since this Court held in *Gideon* that an uncounseled felony conviction calls for a new trial with counsel, we are compelled to strike down a fully counseled pre-*Gideon* conviction obtained through a trial in which evidence of one or more prior uncounseled convictions was collaterally used. This, of course, gives *Gideon* a collateral consequence of wholly unrealistic dimensions that are unrelated to basic fairness or due process; it is an effort to "unring the bell" on a series of burglary convictions dating back to a period 41 years ago. Parenthetically, I note that Loper nowhere denies that he committed these burglaries.

We all agree that the convictions used to impeach Loper's credibility during the 1947 trial were valid under the law prevailing at that time. The jury at Loper's 1947 trial cannot, therefore, be said to have been misled in regard to any contemporaneous matter of fact. Nor can it be said, without distorting the doctrine of retroactivity beyond all semblance of rationality and common sense, that the prosecutor or the presiding judge at Loper's rape trial acted in violation of the principle of "fundamental fairness." If Loper's trial was "funda-

mentally fair" when it was conducted, how can it be said to have undergone a metamorphosis because—16 years later and for another purpose—the law changed?

When we held that *Gideon* is retroactive, we meant that *Gideon* applies to an uncounseled felony conviction obtained in the past and renders *that conviction* invalid for all *future* purposes, *i. e.*, it renders unlawful the continuation into the future of the convicted prisoner's incarceration unless a new trial is had. *Gideon* does not, however, render such a conviction retroactively invalid for all purposes to which it may have already been put *in the past.* The Court, in giving such an enlarged effect to *Gideon,* plows new ground, disregarding the implications that will surely follow from the broadening of scope it now gives to the doctrine of retroactivity. For there must be many convictions that will be senselessly rendered vulnerable to attack by today's holding.

The Court applies the doctrine of retroactivity as though it required us to assess the fairness of past judicial proceedings without making any distinctions between a decision that was rendered *after* those proceedings and given retroactive effect, and a decision that was rendered *before* those proceedings; the Court thus seems to view the doctrine of retroactivity as requiring us to judge the fairness of Loper's 1947 rape trial as though that trial followed *Gideon.* Had the trial indeed followed *Gideon,* and had the trial judge permitted the prosecution to use prior uncounseled convictions to impeach Loper, then it might well be said that the judge denied fundamental fairness to Loper in refusing to follow the clear teaching of a decision of this Court and in thereby "erod[ing] the principle" of that decision. *Burgett* v. *Texas,* 389 U. S. 109, 115 (1967). We are, however, presented with no such situation here. The judge at Loper's trial did not refuse to follow any decision of this Court. Indeed, had he made the ruling

that the Court today implicitly holds he was required to make, he would have been very specifically refusing thereby to follow this Court's then-controlling decision in *Betts* v. *Brady*.

The plurality opinion states that "[i]f the retroactivity of *Gideon* is 'sound,' then this case cannot be decided under the ill-starred and discredited doctrine of *Betts* v. *Brady* . . . ." If we are precise, of course, this case is not to be "decided under" either *Betts* or *Gideon*, for it raises an entirely different question from that which the Court faced in those two cases. Both *Betts* and *Gideon* dealt with the *substantive* right to counsel in a state felony trial. The instant case deals with the collaterally related, but altogether different, question of the fundamental fairness of an implied *evidentiary ruling* made long before *Gideon*. The failure of the plurality opinion to recognize this simple, albeit crucial, distinction unfortunately prevents the drawing of a rational line that would preserve all the values of both *Gideon* and *Burgett* without at the same time producing the extravagant result reached by the Court today.

The introduction, in good faith and without objection, of lawfully admissible evidence, the truth of which is not presently subject to challenge, can hardly be called a violation of due process. Nor will such a violation arise retroactively by the occurrence of later events that may give grounds for challenging the truth of that evidence. Cf. *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963): "[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." In 1947, Loper's prior burglary convictions, viewed as matters of evidentiary fact in the light of this Court's then-recent decision in *Betts* v. *Brady*, were valid convictions. Being valid in 1947, they were then admissible in evidence to impeach Loper's credibility. This Court's decision in *Gideon* 16 years

later may have rendered one or more of those convictions vulnerable to attack and not usable for *future* evidentiary or other purposes. Bearing in mind, however, that those burglary convictions were nothing but matters of evidentiary fact for the purposes of Loper's 1947 rape trial, any subsequently discovered invalidity in one of those burglary convictions no more rendered the conduct of Loper's rape trial fundamentally unfair than would the subsequent discovery of new evidence tending, for example, to discredit the testimony of a prosecution witness who was questioned in good faith by the State. The holding in *Gideon* that uncounseled convictions are constitutionally invalid properly leads us to require new trials to sustain any further confinement of persons previously convicted without counsel. But where prior uncounseled convictions were used in a pre-*Gideon* trial solely for *evidentiary* purposes to impeach the defendant, the logic of the rule enunciated in *Townsend* v. *Sain, supra,* counsels that we should treat *Gideon* for what it is *in this context, i. e.,* a decision whose effect on the prior impeaching convictions is properly analogized to the discovery of new evidence. Neither fundamental fairness nor any specific constitutional provision requires that a rule of evidence be made retroactive; consideration for the orderly administration of justice dictates the contrary.

Burgett v. *Texas, supra,* on which the plurality opinion relies, should not be read either to require or to justify today's decision. *Burgett* dealt with a post-*Gideon* trial and established that it is a violation of due process to introduce against a defendant evidence of a prior conviction *known at the time of its introduction* to be constitutionally infirm under *existing* law. In regard to Loper's case, the worst that can be said is that 16 years *after* his trial there was an event—the decision in *Gideon*—that, had it pre-dated rather than post-

dated the trial, would have affected an evidentiary ruling by the trial judge.

The rule implicit in the result reached by the Court today does violence both to common sense and to society's interest in the finality of judgments. Only if trial judges were soothsayers could they adhere to it. For under that rule, a prior conviction, admissible for impeachment purposes under state law and fully valid under the Constitution as explicitly interpreted by this Court at the time the conviction is sought to be introduced, becomes retroactively inadmissible if, years after the trial, a decision of this Court renders that prior conviction constitutionally infirm. With all respect, I submit that the United States Constitution does not give this Court the power to impose upon the States any such unmanageable and abstractly based rule as that. Indeed, such a rule is repugnant to the concept of federalism and to the very notions of reasonableness and orderliness embodied in the Due Process Clause. It is a distressing example of pressing the sound doctrine of retroactivity beyond the outer limits of its logic.

If *Burgett* does, indeed, mean what the plurality opinion reads into it, we should overrule that decision without delay. As Mr. Justice Harlan, for himself, Mr. Justice Black and MR. JUSTICE WHITE, observed, "We do not sit as a court of errors and appeals in state cases . . . ." 389 U. S., at 120.

MR. JUSTICE BLACKMUN, dissenting.

The plurality in this case applies *Burgett* v. *Texas*, 389 U. S. 109 (1967), and, seemingly, *United States* v. *Tucker*, 404 U. S. 443 (1972), to proscribe the use of allegedly uncounseled prior convictions of many years ago for the purpose of impeaching the defendant who takes the stand in his own defense. *Burgett* may be claimed to be a natural succeeding step to *Gideon* v. *Wainwright*, 372

U. S. 335 (1963), but its application to Loper's case has aspects, not particularly stressed by the plurality, that are troublesome for me:

1. The resolution of the original statutory rape case came down to a choice, on the part of the jury, between the testimony of the eight-year-old victim and the testimony of Loper. This, of course, is not uncommon in a rape case, but it always provides an element of unsureness. It is the woman's—or the child's—word against the man's. Hanging in the balance is a penalty of great severity. The 50-year sentence imposed on Loper is illustrative and is a tempting target for a reviewing court.

2. Obviously, the Court's familiar remand "for further proceedings consistent with this opinion" is really meaningless in this case. Certainly it does not carry with it the usual meaning and implications. The incident that is the subject of the criminal charge took place 25 years ago. The victim, then eight years old, is now about 33. I suspect that an event which would be vivid at the time for a child has faded, mercifully, in the victim's memory. Retrial, if not impossible, is highly unlikely. The Court's remand therefore actually translates into an enforced state acquittal and release for Loper.

3. The plurality's reliance upon Loper's testimony at the habeas hearings and upon certified records of Mississippi and Tennessee proceedings is not complete. Perhaps the records of the 1931 and 1940 proceedings could be said to support an implication that Loper was not represented by counsel in those cases. But no record at all of the 1932 Mississippi proceeding was presented. And the 1935 recital that Loper appeared "in person" is no more than the customary recital, if properly drawn, for any criminal proceeding when counsel is, in fact, present. As the plurality's footnote 3 reveals, Loper testified as to the absence of counsel at only the 1931 and 1940 proceedings. He said nothing with respect to the 1932 and 1935 proceed-

ings. Thus, for me, the 1932 and 1935 prior convictions stand effectively unchallenged on this record. Surely, as to them, Loper has not sustained his burden of proof.

4. I have more than a mild suspicion that as a practical matter the outcome of the case would have been exactly the same had the priors not been used to impeach Loper's credibility. Yet their use was legally accepted 25 years ago. That use, now held improper by the Court, destroys the conviction irretrievably.

5. Loper's troubles with the law did not cease with his statutory rape conviction in 1947. As the opinion of the Court of Appeals reveals, 440 F. 2d 934, 936, Loper was on parole in 1963 when he was arrested for car theft in Mississippi. While a parole revocation order was awaiting execution, he escaped and was a fugitive for more than a year.

6. I see no need to recede from *Burgett* v. *Texas* at this time, but its application to the circumstances of Loper's case gives me the impression that what appears to be an acceptable principle can be run into the ground when indiscriminately applied. Here again, by impractical application, the plurality has painted itself into a corner. Here again, some realism is needed. See *United States* v. *Tucker*, 404 U. S., at 452 (BLACKMUN, J., dissenting).

We were advised at oral argument that Loper once more is on parole and is working in Texas.* Thus, assuming he behaves himself or, to put it more formally, that he does not violate his parole, the plurality's decision, however it were to go, would not have much effect upon his present freedom. On balance, I feel that THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, in dissent, have the better of the argument, and certainly the stronger position in the light of the practicalities. I therefore also dissent.

*Tr. of Oral Arg. 27, 31–32.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL join, dissenting.

In reversing the judgment of the Court of Appeals, which affirmed denial of federal habeas corpus relief to petitioner, the plurality undertakes to apply the constitutional doctrine of *Burgett* v. *Texas*, 389 U. S. 109 (1967), and *United States* v. *Tucker*, 404 U. S. 443 (1972), to the case where the uncounseled conviction is used to impeach the criminal defendant when he takes the stand in his own defense at subsequent trial. In order to reach this question, of course, the plurality must conclude that the prior burglary convictions obtained many years ago in Tennessee and Mississippi were in fact uncounseled, and that the defendant had not waived the constitutional right to counsel that *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), accords him. Petitioner so testified with respect to the Mississippi convictions at the federal habeas hearing. But the habeas judge, a veteran of more than 20 years' experience as a federal district court judge, found as follows with respect to petitioner's assertions of constitutional error:

> "At the outset it might be stated that petitioner has made false statements under oath, and has testified to a set of facts so roundly and thoroughly shown to be false by unimpeachable evidence that little or no credence may be placed in his own testimony. . . ." (App. 61.)

On the basis of other factual inconsistencies that were resolved against the petitioner, the trial judge made the following general observation concerning petitioner's credibility:

> "As stated at the outset, petitioner has filed innumerable applications for relief. Pound for pound,

> he is probably the most prolific writer of writs to come before this Court. His applications, verified under oath, and his testimony in open court under oath, have been found repeatedly to be completely false." (App. 65.)

It is therefore surprising, at least at first blush, to find the plurality reaching the constitutional question that it decides. I believe the procedural posture in which this case is presented calls for more attention than it receives in the plurality's opinion.

In 1947, petitioner was convicted in a Texas state court of the crime of statutory rape of his eight-year-old stepdaughter. In the course of that trial, petitioner took the stand, and, as appropriate under Texas law, was cross-examined about four prior convictions for burglary, which had been obtained against him in the States of Mississippi and Tennessee during the period from 1931 to 1940. The jury convicted petitioner of the offense, and sentenced him to serve 50 years in the penitentiary. That conviction has long since become final, and indeed petitioner is now on parole.

In the present habeas proceeding, petitioner sought to attack not only the 25-year-old Texas judgment of conviction under which he still serves, but also to challenge the constitutional validity of the Mississippi and Tennessee burglary convictions which vary in age from 30 to 40 years. He introduced certified copies of a 1940 Mississippi conviction, reciting appearances at the trial by the prosecutor and by "the defendant in his own proper person"; a certified copy of the indictment and judgment in a 1935 Tennessee burglary conviction reciting appearances by the prosecutor "and the defendant in person"; and a certified copy of an indictment, judgment, and sentence obtained in Mississippi in 1931, which were silent regarding the presence or absence of counsel. No documentary evidence whatever was introduced with re-

spect to the 1932 Mississippi burglary conviction, which was the fourth such judgment about which he was interrogated in the course of the Texas rape trial.

In addition to such documentary evidence, petitioner in the federal habeas proceeding took the stand himself and testified explicitly that he had not been advised of his right to counsel, nor had he been furnished counsel in the 1931 and 1940 Mississippi burglary convictions. But the testimony of the petitioner in this proceeding was found by the federal habeas judge to be false. (*Supra,* at 498.)

In *Johnson* v. *Zerbst,* 304 U. S. 458, 468–469 (1938), one of the landmark habeas corpus decisions of this Court, Mr. Justice Black said:

> "It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on *habeas corpus.* When collaterally attacked, the judgment of a court carries with it a presumption of regularity. [Footnote omitted.] Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus,* the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel. If in a *habeas corpus* hearing, he does meet this burden and convinces the court by a preponderance of evidence that he neither had counsel nor properly waived his constitutional right to counsel, it is the duty of the court to grant the writ."

In addition to the very substantial interests in "a visible end to the litigable aspect of the criminal process . . . ," [1] this case presents other unique practical con-

[1] *Mackey* v. *United States,* 401 U. S. 667, 690 (1971) (separate opinion of Harlan, J.).

siderations for placing the traditional *Johnson* burden upon the petitioner to establish a substantial constitutional deprivation. In this case, unlike the normal habeas proceeding, not only the underlying state conviction is put in question, but also convictions of another era from other States.

It is a sufficiently difficult task for a federal district court sitting in Texas to review a Texas state criminal proceeding for constitutional error; in that case the Texas state custodian himself is a defendant in the proceeding, all counsel and the district judge are familiar with local Texas criminal procedure, and the State and petitioner both have available such witnesses as may be necessary to augment the record pertaining to the judgment under attack. Whatever evidentiary hearing is held will take place in the general locale where those witnesses who have knowledge of the earlier state proceedings are available to testify.

It is a good deal more difficult for the same Texas habeas court to make a second-level collateral review of judgments of conviction rendered in the state courts of Mississippi and Tennessee. The States that rendered the convictions are not parties to the Texas habeas proceeding, and, of course, have no interest whatever in sustaining the validity of sentences long since served. Neither the Texas District Court nor Texas counsel can be expected to have any familiarity with the vagaries of criminal procedure in Mississippi and Tennessee. If there are any surviving witnesses to the actual court proceedings, which took place from 30 to 40 years ago, they are sufficiently distant from the location of the Texas habeas court as to render their voluntary appearance unlikely, and their compulsion by process impossible.

In *Carnley* v. *Cochran*, 369 U. S. 506 (1962), a case that came here on certiorari to review a judgment of the

Supreme Court of Florida, this Court held that, in the face of a record completely silent on the issue, there was a presumption against waiver of a fundamental constitutional right such as the right to counsel.[2] One need not quarrel with this principle, applied as it was in *Carnley* to the review of a state supreme court refusal to vacate a recent judgment of one of its lower courts, to believe that in the circumstances presented by the instant case the burden of proof prescribed for federal habeas actions in *Johnson* v. *Zerbst, supra,* should remain on the habeas petitioner. This is consistent with the holding last Term in *Kitchens* v. *Smith,* 401 U. S. 847, 848 (1971), in which a petitioner asserted in a state habeas proceeding that his Sixth Amendment rights under *Gideon* v. *Wainwright* had been violated because the State had failed to provide him with counsel in a 1944 proceeding at which time he alleged he was indigent. In reversing the denial of habeas relief, the Court said: "Of course, to establish his right to appointed counsel in 1944, petitioner had the burden of proving his inability at that time to hire an attorney."

Under *Gideon* v. *Wainwright,* the petitioner in the case before us was entitled to the assistance of counsel in each of the Mississippi and Tennessee burglary trials in which he was a defendant. However, even under *Gideon,* the assignment of counsel to every criminal defendant is not mandatory; the defendant may, upon being advised of his right, determine that he does not wish to avail himself of it. Thus, the fact that the transcript of the judgment roll admitted from the Tennessee and Mississippi proceedings indicates in at least two of the four cases that petitioner did not have counsel

[2] Carnley was convicted and sentenced on September 19, 1958. On June 16, 1960, the Supreme Court of Florida granted a provisional writ of habeas corpus that was discharged on September 23, 1960. *Carnley* v. *Cochran,* 123 So. 2d 249, 250 (1960).

is not conclusive on the issue of whether his rights under *Gideon* v. *Wainwright* were violated. Under *Johnson* v. *Zerbst*, the burden in federal habeas corpus is upon him to prove to the satisfaction of the federal habeas judge that he did not waive the right to counsel. Here petitioner explicitly testified in a manner that, if the trial judge had chosen to believe him, would indeed have established that he did not waive his right to counsel in the Mississippi proceedings and thus those convictions were obtained in violation of *Gideon* v. *Wainwright*. However, on the basis of his overall assessment of petitioner's credibility, the trial judge declined to believe these self-serving assertions. The uniform doctrine of the cases, both in this Court and elsewhere, is that the finder of fact is entitled to wholly disbelieve the testimony of an interested witness. *NLRB* v. *Pittsburgh S. S. Co.*, 337 U. S. 656, 659 (1949). As I read the memorandum opinion of the District Judge, that is precisely what he chose to do here.

It is true that our grant of certiorari in this case was limited to the question that is decided by the plurality in today's opinion. But the limited nature of the grant is not an advance guarantee that after reading briefs and hearing oral argument, we will be satisfied that the question is properly presented to us. Our duty to avoid constitutional adjudication when narrower grounds of decision are possible is clearly established by such authority as *Ashwander* v. *TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring), and *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549 (1947).

Concluding as I do that the necessary predicate for the plurality's constitutional decision is absent, I would dismiss the writ of certiorari as improvidently granted. Since the plurality addresses itself to the merits of the case, I do likewise. I would affirm the judgment of

the Court of Appeals on the ground that petitioner has not satisfactorily met his burden of proof that the Mississippi and Tennessee convictions were obtained in violation of *Gideon* v. *Wainwright*, and therefore that court was correct in affirming the District Court's judgment denying habeas relief.

HUMPHREY *v.* CADY, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 70–5004. Argued December 7, 1971—Decided March 22, 1972

Petitioner was convicted of contributing to the delinquency of a minor, a misdemeanor punishable by a maximum sentence of one year. In lieu of sentence, he was committed to the "sex deviate facility" in the state prison, for a potentially indefinite period, pursuant to the Wisconsin Sex Crimes Act. That Act provides that when a court finds that a convicted person was "probably directly motivated by a desire for sexual excitement," it may commit the defendant to the Department of Health and Social Services for a social, physical, and mental examination, and if the Department recommends specialized treatment, the court must hold a hearing on the need therefor. If the State establishes the need for treatment, the court must commit the defendant for treatment in lieu of sentence for a period equal to the maximum sentence authorized for the crime. At the end of that period the Department may petition for a renewal of the commitment for five years. After notice and hearing, the court may renew the commitment if it finds that discharge would be "dangerous to the public." Further five-year renewals may be similarly obtained. Petitioner is subject to a five-year renewal order, obtained at the expiration of his one-year sentence. He challenges the original and renewal commitment procedures. He argues that commitment for compulsory treatment under the Sex Crimes Act, at least after the original commitment, is essentially equivalent to commitment under Wisconsin's Mental Health Act, which provides for jury determinations, and that his commitment without jury action deprives him of equal protection of the laws. He also claims that he was denied effective assistance of counsel at both hearings and the opportunity to be present and to confront the State's witnesses at the renewal hearing. He charges equal protection and due process violations as a result of his commitment to state prison rather than to a mental hospital, as provided by the Mental Health Act. At the renewal hearing his counsel argued that a new commitment would constitute double jeopardy and indicated a broad constitutional challenge to the Sex Crimes Act. However, no further action on petitioner's behalf was taken. The District Court dis-

missed his habeas corpus petition on the grounds that his claims were lacking in merit and that they had been waived by failure to present them adequately to the state courts. The Court of Appeals refused to certify probable cause for an appeal, on the ground that the claims were frivolous. *Held:*

1. Petitioner's claims are substantial enough to warrant an evidentiary hearing. *Baxstrom* v. *Herold,* 383 U. S. 107; *Specht* v. *Patterson,* 386 U. S. 605. Pp. 508–514.

(a) The renewal proceedings bear substantial resemblance to the post-sentencing proceedings in *Baxstrom, supra,* and the Wisconsin Supreme Court has held that even the initial commitment is not just a sentencing alternative but an independent commitment for treatment, comparable to commitment under the Mental Health Act. Pp. 508–511.

(b) The Mental Health Act and the Sex Crimes Act are apparently not mutually exclusive, and an equal protection claim would be persuasive if it develops on remand that petitioner was deprived of a jury determination or other procedural protections merely by the arbitrary decision to seek commitment under one Act rather than the other. P. 512.

(c) Remand will provide ample opportunity to develop facts relevant to respondent's claim of mootness as well as to petitioner's other constitutional claims. Pp. 512–514.

2. Federal habeas corpus is not barred by every state procedural default, and an evidentiary hearing is required to determine whether petitioner knowingly and intelligently made a deliberate strategic waiver of his claims in state court. Pp. 514–517.

Reversed and remanded to District Court.

MARSHALL, J., delivered the opinion of the Court, in which all Members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

Irvin B. Charne, by appointment of the Court, 402 U. S. 927, argued the cause and filed briefs for petitioner.

George L. Frederick, Assistant Attorney General of Wisconsin, argued the cause for respondent. With him on the brief were *Robert W. Warren,* Attorney General, and *Mary V. Bowman,* Assistant Attorney General.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner was convicted of contributing to the delinquency of a minor, a misdemeanor punishable by a maximum sentence of one year. Wis. Stat. Ann. § 947.15 (1958). In lieu of sentence, he was committed to the "sex deviate facility," located in the state prison, for a potentially indefinite period of time, pursuant to the Wisconsin Sex Crimes Act. Wis. Stat. Ann. § 959.15 (1958), as amended, Wis. Stat. Ann., c. 975 (1971). In this petition for federal habeas corpus, he seeks to challenge the constitutional validity of the statutory procedures for commitment and the conditions of his confinement. The District Court dismissed his petition without an evidentiary hearing, on the grounds that (1) his claims were for the most part lacking in merit as a matter of law, and (2) his claims had been waived by his failure to present them adequately to the state courts. The Court of Appeals refused to certify probable cause for an appeal, 28 U. S. C. § 2253, relying not on the ground of waiver but solely on the ground that the claims lacked merit.[1] We granted certiorari to consider the constitutional challenge to the statute. 401 U. S. 973 (1971). We have concluded that an evidentiary hearing is necessary to resolve petitioner's constitutional claims, and also to resolve the question of waiver; consequently we remand the case to the District Court for a hearing.[2]

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[1] The Court of Appeals said in pertinent part:

"Plaintiff also claims various procedural rights to which he would be entitled in the course of a separate proceeding for conviction of an offense, but the continuation of commitment is not such [a] proceeding." App. 58.

[2] After the petition for certiorari had been filed, it appears that petitioner was released on parole to the custody of the Secretary of the State Department of Health and Social Services. That change

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The Wisconsin Sex Crimes Act provides that after a person is convicted of any crime, the court may consider whether the crime was "probably directly motivated by a desire for sexual excitement." If the court finds such motivation, it may commit the defendant to the Department of Public Welfare (now the Department of Health and Social Services) for a social, physical, and mental examination. If the Department recommends specialized treatment for the defendant's "mental and physical aberrations," the court must hold a hearing on the need for such treatment. If the State establishes the need for treatment by a preponderance of the evidence, the court must commit the defendant to the Department for treatment in lieu of sentence, for a period equal to the maximum sentence authorized for the defendant's crime. At the end of that period, the Department may petition for an order renewing the commitment for five years. After notice and hearing, the court may renew the commitment if it finds that the defendant's discharge would be "dangerous to the public because of [his] mental or physical deficiency, disorder or abnormality." Further five-year renewals may be similarly obtained without limitation.

Petitioner is presently subject to a five-year renewal order, obtained at the expiration of his one-year maximum sentence. His principal claims relate to the procedure that resulted in the order renewing his commitment. In addition, he challenges the original commitment procedures, and the conditions of his confinement.

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in his custody does not necessarily moot his claims; it simply requires the substitution of the Secretary for the prison warden as respondent, which can be accomplished by motion under Rule 49 of this Court, or by the District Court on remand.

A review of petitioner's claims compels us to conclude that they are at least substantial enough to warrant an evidentiary hearing, in light of this Court's decisions in *Baxstrom* v. *Herold*, 383 U. S. 107 (1966), and *Specht* v. *Patterson*, 386 U. S. 605 (1967). Thus we reject the contrary conclusion of the Court of Appeals, implicit in its decision to deny leave to appeal.

A. One of petitioner's principal arguments is that commitment for compulsory treatment under the Sex Crimes Act, at least after the expiration of the initial commitment in lieu of sentence, is essentially equivalent to commitment for compulsory treatment under Wisconsin's Mental Health Act, Wis. Stat. Ann., c. 51 (1957); that a person committed under the Mental Health Act has a statutory right to have a jury determine whether he meets the standards for commitment, Wis. Stat. Ann. § 51.03; and that petitioner's commitment under the Sex Crimes Act without such a jury determination deprived him of equal protection of the laws.

In *Baxstrom*, substantially the same argument was advanced by a convicted prisoner who was committed under New York law for compulsory treatment, without a jury trial, at the expiration of his penal sentence. This Court held that the State, having made a jury determination generally available to persons subject to commitment for compulsory treatment, could not, consistent with the Equal Protection Clause, arbitrarily withhold it from a few. 383 U. S., at 110–112. The Court recognized that the prisoner's criminal record might be a relevant factor in evaluating his mental condition, and in determining the type of care and treatment appropriate for his condition; it could not, however, justify depriving him of a jury determination on the basic question whether he was mentally ill and an appropriate subject for some kind of compulsory treatment.

Since 1880, Wisconsin has relied on a jury to decide whether to confine a person for compulsory psychiatric treatment.[3] Like most, if not all, other States with similar legislation, Wisconsin conditions such confinement not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty.[4] In making this determination, the jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment.[5]

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[3] The jury-trial provision first appeared in c. 266, Wis. Laws 1880, pp. 299, 301; compare Wis. Rev. Stat. § 593, p. 208 (1878), with Wis. Rev. Stat. § 593, p. 114 (1883 Supp.).

[4] The Mental Health Act authorizes commitment of a person for compulsory treatment if the court or jury finds that he is (1) mentally ill, and (2) a "proper subject for custody and treatment." Wis. Stat. Ann. §§ 51.02 (5), 51.03 (1957). The social and legal aspects of the determination are implicit not only in the determination of who is a "proper subject for custody and treatment," but also in the definition of mental illness itself, contained in the Interstate Compact on Mental Health, and recently adopted by Wisconsin, as well as by many other States:

" 'Mental illness' means mental disease *to such extent* that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community." (Emphasis added.) Wis. Stat. Ann. § 51.75, Art. II (f) (Supp. 1971).

[5] In 1926 the Wisconsin Legislature voted to eliminate the jury-trial provision from the Mental Health Act, at the request of the state medical society, but the Governor vetoed the bill. Again in 1947 an attempt was made to eliminate the jury trial. A legislative committee reported that juries too often refused to order commitment when the medical experts thought it appropriate. Wis. Stat. 1947, c. 51, general comment of interim committee, at 802. This time the state legislature refused to do away with jury trials, however, and indeed when the legislature enacted in that same year a

Commitment for compulsory treatment under the Wisconsin Sex Crimes Act appears to require precisely the same kind of determination, involving a mixture of medical and social or legal judgments.[6] If that is so (and that is properly a subject for inquiry on remand), then it is proper to inquire what justification exists for depriving persons committed under the Sex Crimes Act of the jury determination afforded to persons committed under the Mental Health Act.

Respondent seeks to justify the discrimination on the ground that commitment under the Sex Crimes Act is triggered by a criminal conviction; that such commitment is merely an alternative to penal sentencing; and consequently that it does not require the same procedural safeguards afforded in a civil commitment proceeding. That argument arguably has force with respect to an initial commitment under the Sex Crimes Act, which is imposed in lieu of sentence, and is limited

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new statute for the compulsory treatment of "sex psychopaths," the new statute contained a provision for jury trial paralleling the provision in the Mental Health Act. Wis. Stat. 1947, § 51.37 (4). Not until 1951, with the passage of a new Sex Crimes Act, did the provision for jury trial disappear from the legislation governing the compulsory treatment of sex offenders. Wis. Stat. 1951, § 340.485 (14) (a).

[6] The Sex Crimes Act authorizes an initial commitment of an otherwise eligible person for compulsory treatment if the court finds that he is in need of "specialized treatment for his mental or physical aberrations," Wis. Stat. Ann. § 975.06 (1)–(2) (1971), which restated Wis. Stat. Ann. § 959.15 (5)–(6), adding a provision for a judicial hearing, as required by the Wisconsin Supreme Court in *Huebner* v. *State,* 33 Wis. 2d 505, 147 N. W. 2d 646 (1967). The statute authorizes renewal of the commitment order if the court finds that discharge would be "dangerous to the public because of the person's mental or physical deficiency, disorder or abnormality." Wis. Stat. Ann. § 975.14 (1971), formerly Wis. Stat. Ann. § 959.15 (14) (b) (1958).

in duration to the maximum permissible sentence.[7] The argument can carry little weight, however, with respect to the subsequent renewal proceedings, which result in five-year commitment orders based on new findings of fact, and are in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime. The renewal orders bear substantial resemblance to the post-sentence commitment that was at issue in *Baxstrom*. Moreover, the Wisconsin Supreme Court has expressly held that even the initial commitment under the Sex Crimes Act is not simply a sentencing alternative, but rather an independent commitment for treatment, comparable to commitment under the Mental Health Act. The Wisconsin court held, anticipating this Court's decision in *Specht* v. *Patterson*, 386 U. S. 605 (1967), that a hearing was required even for the initial commitment under the Sex Crimes Act. *Huebner* v. *State*, 33 Wis. 2d 505, 521–530, 147 N. W. 2d 646, 654–658 (1967). While the *Huebner* decision was grounded in considerations of procedural due process, the Wisconsin court also noted carefully the relevance of *Baxstrom* and the Equal Protection Clause to its decision.[8]

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[7] Two courts of appeals have implied the contrary, see *Matthews* v. *Hardy*, 137 U. S. App. D. C. 39, 420 F. 2d 607 (1969), cert. denied, 397 U. S. 1010 (1970), and *United States ex rel. Schuster* v. *Herold*, 410 F. 2d 1071 (CA2), cert. denied, 396 U. S. 847 (1969). This case does not present the claim of right to a jury trial at the initial commitment, however, and we intimate no view on that question here. Petitioner's only objections to the initial commitment are discussed *infra*, at 513.

[8] Following *Huebner*, petitioner rests his claim alternatively on *Specht* and the Due Process Clause, or on *Baxstrom* and the Equal Protection Clause. The Wisconsin Supreme Court has, however, rejected the argument that either *Baxstrom* or *Huebner* requires the State to extend to sex offenders the right to a jury trial at the

An alternative justification for the discrimination might be sought in some special characteristic of sex offenders, which may render a jury determination uniquely inappropriate or unnecessary. It appears, however, that the Mental Health Act and the Sex Crimes Act are not mutually exclusive; that "aberrations" warranting commitment under the latter might also amount to "mental illness" warranting commitment under the former.[9] The equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other.[10]

B. The remand hearing will also provide an opportunity for the District Court to consider factual questions relevant to petitioner's other claims. In addition to the lack of a jury trial, petitioner challenges several other aspects of the hearing that led to the renewal of his commitment. He claims he was denied effective assistance of counsel, and he was denied the opportunity to be present and to confront the State's witnesses. These claims are tied inextricably to the

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hearing on the petition for renewal of commitment. *Buchanan* v. *State*, 41 Wis. 2d 460, 164 N. W. 2d 253 (1969). In rejecting the equal protection claim, the court relied on distinctions so elusive that, if they can support the discrimination at all, they will require further factual development at the remand hearing in this case. The jury question was also raised, but not decided, in *Hill* v. *Burke*, 289 F. Supp. 921 (WD Wis. 1968), aff'd, 422 F. 2d 1195 (CA7 1970).

[9] Tr. of Oral Arg. 22; Respondent's Supplemental Memorandum, filed Feb. 25, 1971, pp. 3–4. Compare the criteria for commitment in n. 4 with the criteria in n. 6, *supra*.

[10] *Baxstrom* v. *Herold*, *supra*, at 111; *Cross* v. *Harris*, 135 U. S. App. D. C. 259, 262, 418 F. 2d 1095, 1098 (1969); *Millard* v. *Harris*, 132 U. S. App. D. C. 146, 152, 406 F. 2d 964, 970 (1968).

question of possible waiver of rights at that hearing, a question that clearly requires further exploration on remand, see *infra,* at 514–517.

Petitioner also challenges the adequacy of the hearing that led to his initial commitment. The record shows that petitioner was not represented by counsel at that initial commitment, App. 11–12, and thus the question arises whether the state court ever in fact held the hearing required by *Huebner* and *Specht,* and now by statute as well. Moreover, petitioner claims that, even if there was such a hearing, it provided at most an opportunity to challenge the finding that he needed treatment, and not an opportunity to challenge the initial determination that his crime was sexually motivated, a determination that was a necessary prerequisite to the invocation of the whole commitment process. Respondent argues that any defect in the initial commitment has been rendered moot by the intervening renewal hearing.[11] It may be, however, that the initial commitment has continuing effects that cannot be remedied by a mere attack on the subsequent renewal order.[12] On remand, the District Court should resolve this threshold question of mootness, and if the Court determines that the merits of these claims are properly before it, then it should proceed to resolve the relevant factual and legal questions.

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[11] See *State ex rel. Stroetz* v. *Burke,* 28 Wis. 2d 195, 136 N. W. 2d 829 (1965).

[12] For example, if petitioner can successfully challenge the initial finding that his crime was sexually motivated, then his commitment under the Sex Crimes Act would be improper even if he meets the statutory standards for continued commitment, *i. e.,* even if his discharge would be "dangerous to the public because of . . . mental or physical . . . abnormality." In that case, he could properly be committed only under the Mental Health Act, in accordance with its procedures and criteria for commitment, and its conditions of confinement.

Finally, petitioner challenges the place and character of his confinement under the Sex Crimes Act. He objects to the fact that he was committed to the state prison, rather than to a mental hospital, as he would have been under the Mental Health Act; and he contends that no treatment was provided at the prison, notwithstanding the fact that he was in a prison unit labeled "Sex Deviate Facility." These matters, in his view, deprived him of equal protection and due process. Respondent argues that this aspect of petitioner's claim has become moot, because (1) petitioner has been released on parole, see n. 2, *supra*, and (2) the State has established a new treatment facility at the state mental hospital, to which petitioner might be committed if his parole were revoked.[13] On remand, the parties will have ample opportunity to develop the facts relevant to the question of mootness, as well as to petitioner's substantial constitutional claims.

II

Plainly, then, we cannot accept as a ground for decision the conclusion of the Court of Appeals that petitioner's claims are too frivolous to require a hearing. An alternative ground was relied on by the District Court, however, and respondent presses that argument here. The District Court held that petitioner had waived his constitutional claims by failing to present them properly to the state courts. In order to consider this argument, it will be necessary to review the somewhat complicated procedural history of this case.

Petitioner first sought to challenge the constitutionality of the Sex Crimes Act at the hearing on the State's petition to renew his commitment beyond the initial one-year period. His appointed counsel argued that

[13] See Brief for Respondent 28–30, and Appendix to Brief 140–156.

a new commitment order would constitute a prohibited second punishment for a single offense, and indicated that she was making a broad constitutional challenge to the Sex Crimes Act. The state trial judge adjourned the matter to permit the parties to brief the constitutional issues. When petitioner's counsel failed to submit a brief, or to take any further action on behalf of petitioner, the state court concluded that the bare petition of the Department of Public Welfare was sufficient to support an order continuing petitioner's confinement.[14] No appeal was taken from that order.[15]

Petitioner subsequently filed a petition for habeas corpus, without the assistance of counsel, in the Wisconsin Supreme Court, which at that time was the only state court authorized to grant habeas corpus relief to state prisoners.[16] The petition was summarily dismissed without a response from the State or an opinion by the court. While the petition is not in the record before us, both parties represent that it was substantially identical to the subsequent petition for federal habeas corpus that initiated the present proceedings.[17]

The federal petition, also prepared without the as-

[14] The state court relied largely on petitioner's failure to introduce any evidence in his behalf. In this connection it is noteworthy that the record does not show any evidence introduced by the State, either; moreover, under Wisconsin law, the State has the burden of proof in such proceedings. *Goetsch* v. *State*, 45 Wis. 2d 285, 172 N. W. 2d 688 (1969) (decided after the commitment hearing in this case).

[15] An appeal is authorized by Wis. Stat. Ann. § 975.16, formerly Wis. Stat. Ann. § 959.15 (16).

[16] Wis. Stat. Ann., c. 292 (1958), which has been replaced by a comprehensive post-conviction review statute, Wis. Stat. Ann. § 974.06 (1971).

[17] On remand, the District Court will have the opportunity to ascertain precisely what claims were presented in the state habeas petition.

sistance of counsel, alleges, in addition to the claim of double jeopardy, a claim that petitioner was denied equal protection and due process, referring specifically to, *inter alia*, the lack of a jury trial, and confinement in the state prison.

The District Court held that the failure of petitioner's trial counsel to file a brief in the state trial court amounted to a deliberate strategic decision to abandon petitioner's constitutional claims; it justified the Wisconsin Supreme Court's denial of post-conviction relief; and it operated as a bar to federal relief as well. We cannot agree with respondent or the District Court that the present record shows the deliberate bypass of state remedies that might bar federal consideration of petitioner's claims. We conclude, however, that respondent should be given an opportunity to develop the relevant facts. Accordingly, the case must be remanded for an evidentiary hearing on this point, as well as on the merits of such claims as may be ripe for federal determination.

This Court has repeatedly made it plain that not every state procedural default bars federal habeas corpus relief. Title 28 U. S. C. §§ 2254 (b), (c), which require a state prisoner to exhaust available state remedies, are limited in their application to those state remedies still open to the habeas applicant at the time he files his application in federal court. *Fay* v. *Noia*, 372 U. S. 391, 434–435 (1963); see *Picard* v. *Connor*, 404 U. S. 270, 272 n. 3 (1971). In this case it appears that petitioner has met the requirements of the exhaustion rule, inasmuch as no direct appeal is presently available to him, and he has taken his claim for post-conviction relief to the highest state court.[18]

[18] There is, of course, no requirement that petitioner file repetitious applications in the state courts. *Wilwording* v. *Swenson*, 404 U. S. 249 (1971); *Brown* v. *Allen*, 344 U. S. 443, 448 n. 3 (1953). The

This Court has also held, however, that a federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts, on the ground that in so doing he has forfeited his state court remedies. *Fay* v. *Noia, supra,* at 438–439. But such a waiver must be the product of an understanding and knowing decision by the petitioner himself, who is not necessarily bound by the decision or default of his counsel. An evidentiary hearing will ordinarily be required before the District Court can determine whether petitioner made a deliberate strategic waiver of his claim in state court. In this case, a hearing is necessary to determine (1) the reason for counsel's failure to file a brief or to take further action in the state courts, and (2) the extent of petitioner's knowledge and participation in that decision. If the District Court cannot find persuasive evidence of a knowing and intelligent waiver on the part of petitioner himself, then the Court should proceed to consider petitioner's constitutional claims.

The judgment is reversed and the case is remanded to the District Court for further proceedings in accordance with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

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question on remand is whether any of petitioner's claims is so clearly distinct from the claims he has already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim; and if so, whether there is presently available a state forum in which he can effectively present the claim.

Moreover, some or all of petitioner's claims may be entitled to be treated as claims for relief under the Civil Rights Act, 42 U. S. C. § 1983, in which case no exhaustion is required. *Wilwording* v. *Swenson, supra.*

GOODING, WARDEN *v.* WILSON

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70-26. Argued December 8, 1971—Decided March 23, 1972

Georgia statute providing that "[a]ny person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor," which has not been narrowed by the Georgia courts to apply only to "fighting" words "which by their very utterance . . . tend to incite an immediate breach of the peace," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572, is on its face unconstitutionally vague and overbroad under the First and Fourteenth Amendments. Pp. 520–528.

431 F. 2d 855, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. BURGER, C. J., filed a dissenting opinion, *post*, p. 528. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 534. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Courtney Wilder Stanton, Assistant Attorney General of Georgia, argued the cause for appellant. With him on the brief were *Arthur K. Bolton,* Attorney General, *Harold N. Hill, Jr.,* Executive Assistant Attorney General, *Dorothy T. Beasley,* Assistant Attorney General, and *Franklin Pierce.*

Elizabeth R. Rindskopf argued the cause for appellee. On the brief were *Howard Moore, Jr.,* and *Peter E. Rindskopf.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee was convicted in Superior Court, Fulton County, Georgia, on two counts of using opprobrious words and abusive language in violation of Georgia Code

Ann. § 26–6303, which provides: "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." Appellee appealed the conviction to the Supreme Court of Georgia on the ground, among others, that the statute violated the First and Fourteenth Amendments because vague and overbroad. The Georgia Supreme Court rejected that contention and sustained the conviction. *Wilson* v. *State,* 223 Ga. 531, 156 S. E. 2d 446 (1967). Appellee then sought federal habeas corpus relief in the District Court for the Northern District of Georgia. The District Court found that, because appellee had failed to exhaust his available state remedies as to the other grounds he relied upon in attacking his conviction, only the contention that § 26–6303 was facially unconstitutional was ripe for decision.[1] 303 F. Supp. 952 (1969). On the merits

[1] The District Court stated, "Accordingly, this order will not deal with the alleged unconstitutional application of this statute nor any of the other points raised in the writ, except for the facial unconstitutionality of Georgia Code § 26–6303." 303 F. Supp., at 953. The state conviction was upon two counts of assault and battery as well as upon two counts of using opprobrious and abusive language. Appellee was also convicted of federal offenses arising out of the same incident, and those convictions were affirmed by the Court of Appeals for the Fifth Circuit. *Tillman* v. *United States,* 406 F. 2d 930 (1969). The facts giving rise to the prosecutions are stated in the opinion of the Supreme Court of Georgia as follows:

"The defendant was one of a group of persons who, on August 18, 1966, picketed the building in which the 12th Corps Headquarters of the United States Army was located, carrying signs opposing the war in Viet Nam. When the inductees arrived at the building, these persons began to block the door so that the inductees could not enter. They were requested by police officers to move from the door, but refused to do so. The officers attempted to remove them from the door, and a scuffle ensued. There was ample evidence to show that the defendant committed assault and battery on the two police officers named in the indictment. There was also

of that question, the District Court, in disagreement with the Georgia Supreme Court, held that § 26–6303, on its face, was unconstitutionally vague and broad and set aside appellee's conviction. The Court of Appeals for the Fifth Circuit affirmed. 431 F. 2d 855 (1970). We noted probable jurisdiction of the State's appeal, 403 U. S. 930 (1971). We affirm.

Section 26–6303 punishes only spoken words. It can therefore withstand appellee's attack upon its facial constitutionality only if, as authoritatively construed by the Georgia courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments, *Cohen* v. *California*, 403 U. S. 15, 18–22 (1971); *Terminiello* v. *Chicago*, 337 U. S. 1, 4–5 (1949). Only the Georgia courts can supply the requisite construction, since of course "we lack jurisdiction authoritatively to construe state legislation." *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971). It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe

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sufficient evidence of the use of the opprobrious and abusive words charged, and the jury was authorized to find from the circumstances shown by the evidence that the words were spoken without sufficient provocation, and tended to cause a breach of the peace." 223 Ga. 531, 535, 156 S. E. 2d 446, 449–450.

"Count 3 of the indictment alleged that the accused 'did without provocation use to and of M. G. Redding and in his presence, the following abusive language and opprobrious words, tending to cause a breach of the peace: "White son of a bitch, I'll kill you." "You son of a bitch, I'll choke you to death."' Count 4 alleged that the defendant 'did without provocation use to and of T. L. Raborn, and in his presence, the following abusive language and opprobrious words, tending to cause a breach of the peace: "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."'" *Id.*, at 534, 156 S. E. 2d, at 449.

speech and when "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution," *Dombrowski* v. *Pfister,* 380 U. S. 479, 491 (1965), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity," *id.,* at 486; see also *Baggett* v. *Bullitt,* 377 U. S. 360, 366 (1964); *Coates* v. *City of Cincinnati,* 402 U. S. 611, 616 (1971); *id.,* at 619–620 (WHITE, J., dissenting); *United States* v. *Raines,* 362 U. S. 17, 21–22 (1960); *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

> "Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights." *Coates* v. *City of Cincinnati, supra,* at 619–620 (opinion of WHITE, J.) (citation omitted).

The constitutional guarantees of freedom of speech forbid the States to punish the use of words or

language not within "narrowly limited classes of speech." *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571 (1942). Even as to such a class, however, because "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," *Speiser* v. *Randall,* 357 U. S. 513, 525 (1958), "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom," *Cantwell* v. *Connecticut,* 310 U. S. 296, 304 (1940). In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP* v. *Button, supra,* at 433.

Appellant does not challenge these principles but contends that the Georgia statute is narrowly drawn to apply only to a constitutionally unprotected class of words—"fighting" words—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky* v. *New Hampshire, supra,* at 572. In *Chaplinsky,* we sustained a conviction under Chapter 378, § 2, of the Public Laws of New Hampshire, which provided: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name . . . ." Chaplinsky was convicted for addressing to another on a public sidewalk the words, "You are a God damned racketeer," and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." Chaplinsky challenged the constitutionality of the statute as inhibiting freedom of expression because it was vague and indefinite. The Supreme Court of New Hampshire, however, "long be-

fore the words for which Chaplinsky was convicted," sharply limited the statutory language "offensive, derisive or annoying word" to "fighting" words:

> "[N]o words were forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed. . . .
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> . . . . . .
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> "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . Derisive and annoying words can be taken as coming within the purview of the statute . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . .
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> "The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee . . . ." 91 N. H. 310, 313, 320–321, 18 A. 2d 754, 758, 762 (1941).

In view of that authoritative construction, this Court held: "We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace." 315 U. S., at 573. Our decisions since *Chaplinsky* have continued to recognize state power constitutionally to punish "fighting" words under carefully drawn statutes not also susceptible of application to protected expression, *Cohen* v. *California*, 403 U. S., at 20; *Bachellar* v. *Maryland*, 397 U. S. 564, 567 (1970); see *Street* v. *New York*, 394 U. S. 576, 592 (1969). We reaffirm that proposition today.

Appellant argues that the Georgia appellate courts have by construction limited the proscription of § 26–6303 to "fighting" words, as the New Hampshire Supreme Court limited the New Hampshire statute. "A consideration of the [Georgia] cases construing the elements of the offense makes it clear that the opprobrious words and abusive language which are thereby prohibited are those which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person, and in his presence, naturally tend to provoke violent resentment. The statute under attack simply states in statutory language what this Court has previously denominated 'fighting words.'" Brief for Appellant 6. Neither the District Court nor the Court of Appeals so read the Georgia decisions. On the contrary, the District Court expressly stated, "Thus, in the decisions brought to this Court's attention, no meaningful attempt has been made to limit or properly define these terms." 303 F. Supp., at 955. The District Judge and one member of the unanimous Court of Appeals panel were Georgia practitioners before they ascended the bench.[2] Their views of Georgia law necessarily are persuasive with us. C. Wright, Law of Federal Courts § 58, pp. 240–241 (2d ed. 1970). We have, however, made our own examination of the Georgia cases, both those cited and others discovered in research. That examination brings us to the conclusion, in agreement with the courts below, that the Georgia appellate decisions have not construed § 26–6303 to be limited in application, as in *Chaplinsky*, to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."

[2] Judge Sidney O. Smith, Jr., of Gainesville, Georgia, was the District Judge. Judge Lewis R. Morgan of Newnan, Georgia, a member of the Court of Appeals panel, sat as District Judge in Georgia before his appointment to the Court of Appeals.

The dictionary definitions of "opprobrious" and "abusive" give them greater reach than "fighting" words. Webster's Third New International Dictionary (1961) defined "opprobrious" as "conveying or intended to convey disgrace," and "abusive" as including "harsh insulting language." Georgia appellate decisions have construed § 26–6303 to apply to utterances that, although within these definitions, are not "fighting" words as *Chaplinsky* defines them. In *Lyons* v. *State,* 94 Ga. App. 570, 95 S. E. 2d 478 (1956), a conviction under the statute was sustained for awakening 10 women scout leaders on a camp-out by shouting, "Boys, this is where we are going to spend the night." "Get the G-- d--- bed rolls out . . . let's see how close we can come to the G-- d--- tents." Again, in *Fish* v. *State,* 124 Ga. 416, 52 S. E. 737 (1905), the Georgia Supreme Court held that a jury question was presented by the remark, "You swore a lie." Again, *Jackson* v. *State,* 14 Ga. App. 19, 80 S. E. 20 (1913), held that a jury question was presented by the words addressed to another, "God damn you, why don't you get out of the road?" Plainly, although "conveying . . . disgrace" or "harsh insulting language," these were not words "which by their very utterance . . . tend to incite an immediate breach of the peace." *Chaplinsky* v. *New Hampshire, supra,* at 572.

Georgia appellate decisions construing the reach of "tending to cause a breach of the peace" underscore that § 26–6303 is not limited, as appellant argues, to words that "naturally tend to provoke violent resentment." *Lyons* v. *State, supra; Fish* v. *State, supra;* and *Jackson* v. *State, supra.* Indeed, the Georgia Court of Appeals [3] in *Elmore* v. *State,* 15 Ga. App. 461, 83 S. E.

[3] We were informed in oral argument that the Court of Appeals of Georgia is a court of statewide jurisdiction, the decisions of which are binding upon all trial courts in the absence of a conflicting decision of the Supreme Court of Georgia. Federal courts therefore

799 (1914), construed "tending to cause a breach of the peace" as mere

> "words of description, indicating the kind or character of opprobrious or abusive language that is penalized, and the use of language of this character is a violation of the statute, even though it be addressed to one who, on account of circumstances or by virtue of the obligations of office, can not actually then and there resent the same by a breach of the peace . . . .
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> ". . . Suppose that one, at a safe distance and out of hearing of any other than the person to whom he spoke, addressed such language to one locked in a prison cell or on the opposite bank of an impassable torrent, and hence without power to respond immediately to such verbal insults by physical retaliation, could it be reasonably contended that, because no breach of the peace could then follow, the statute would not be violated? . . .
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> ". . . [T]hough, on account of circumstances or obligations imposed by office, one may not be able at the time to assault and beat another on account of such language, it might still tend to cause a breach of the peace at some future time, when the person to whom it was addressed might be no longer hampered by physical inability, present conditions, or official position." 15 Ga. App., at 461–463, 83 S. E., at 799–800.[4]

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follow these holdings as to Georgia law. *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169 (1940); *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198, 205 (1956).

[4] The dissents question reliance upon Georgia cases decided more than 50 years ago. But *Fish* v. *State*, 124 Ga. 416, 52 S. E. 737 (1905), and *Jackson* v. *State*, 14 Ga. App. 19, 80 S. E. 20 (1913), were cited by the Supreme Court of Georgia in 1967 in *Wilson* v. *State*, 223 Ga. 531, 156 S. E. 2d 446, to support that holding. Thus, *Fish* and *Jackson* remain authoritative interpretations of § 26–6303 by the State's highest court.

Moreover, in *Samuels* v. *State,* 103 Ga. App. 66, 67, 118 S. E. 2d 231, 232 (1961), the Court of Appeals, in applying another statute, adopted from a textbook the common-law definition of "breach of the peace."

> "The term 'breach of the peace' is generic, and includes all violations of the public peace or order, or decorum; in other words, it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community . . . . By 'peace,' as used in this connection, is meant the tranquility enjoyed by the citizens of a municipality or a community where good order reigns among its members."

This definition makes it a "breach of peace" merely to speak words offensive to some who hear them, and so sweeps too broadly. *Street* v. *New York,* 394 U. S., at 592. "[H]ow infinitely more doubtful and uncertain are the boundaries of an offense including any 'diversion *tending* to a breach of the peace' . . . ." *Gregory* v. *Chicago,* 394 U. S. 111, 119 (1969) (Black, J., concurring) (emphasis supplied).

Accordingly, we agree with the District Court that our decisions in *Ashton* v. *Kentucky,* 384 U. S. 195 (1966), and *Cox* v. *Louisiana,* 379 U. S. 536 (1965), compel the conclusion that § 26–6303, as construed, does not define the standard of responsibility with requisite narrow specificity. In *Ashton* we held that "to make an offense of conduct which is 'calculated to create disturbances of the peace' leaves wide open the standard of responsibility." 384 U. S., at 200. In *Cox* v. *Louisiana* the statute struck down included as an element congregating with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby." As the District Court observed, "[a]s construed by the Georgia courts, especially in the instant case, the Georgia provision as to breach of the peace is even broader than the Louisiana statute." 303 F. Supp., at 956.

We conclude that "[t]he separation of legitimate from illegitimate speech calls for more sensitive tools than [Georgia] has supplied." *Speiser* v. *Randall*, 357 U. S., at 525. The most recent decision of the Georgia Supreme Court, *Wilson* v. *State*, *supra*, in rejecting appellee's attack on the constitutionality of § 26–6303, stated that the statute "conveys a definite meaning as to the conduct forbidden, measured by common understanding and practice." 223 Ga., at 533, 156 S. E. 2d, at 448. Because earlier appellate decisions applied § 26–6303 to utterances where there was no likelihood that the person addressed would make an immediate violent response, it is clear that the standard allowing juries to determine guilt "measured by common understanding and practice" does not limit the application of § 26–6303 to "fighting" words defined by *Chaplinsky*. Rather, that broad standard effectively "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry*, 301 U. S. 242, 263 (1937). Accordingly, we agree with the conclusion of the District Court, "[t]he fault of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application." 303 F. Supp., at 955–956. Unlike the construction of the New Hampshire statute by the New Hampshire Supreme Court, the Georgia appellate courts have not construed § 26–6303 "so as to avoid all constitutional difficulties." *United States* v. *Thirty-seven Photographs*, 402 U. S., at 369.

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, dissenting.

I fully join in MR. JUSTICE BLACKMUN's dissent against the bizarre result reached by the Court. It is not merely odd, it is nothing less than remarkable that a court can

find a state statute void on its face, not because of its language—which is the traditional test—but because of the way courts of that State have applied the statute in a few isolated cases, decided as long ago as 1905 and generally long before this Court's decision in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). Even if all of those cases had been decided yesterday, they do nothing to demonstrate that the narrow language of the Georgia statute has any significant potential for sweeping application to suppress or deter important protected speech.

In part the Court's decision appears to stem from its assumption that a statute should be regarded in the same light as its most vague clause, without regard to any of its other language. Thus, since the statute contains the words "tending to cause a breach of the peace" the Court finds its result "compelled" by such decisions as *Ashton* v. *Kentucky*, 384 U. S. 195 (1966), and *Cox* v. *Louisiana*, 379 U. S. 536 (1965). The statute at bar, however, does not prohibit language "tending to cause a breach of the peace." Nor does it prohibit the use of "opprobrious words or abusive language" without more. Rather, it prohibits use "to or of another, and in his presence [of] opprobrious words or abusive language, tending to cause a breach of the peace." If words are to bear their common meaning, and are to be considered in context, rather than dissected with surgical precision using a semantic scalpel, this statute has little potential for application outside the realm of "fighting words" that this Court held beyond the protection of the First Amendment in *Chaplinsky*. Indeed, the language used by the *Chaplinsky* Court to describe words properly subject to regulation bears a striking resemblance to that of the Georgia statute, which was enacted many, many years before *Chaplinsky* was decided. See 315 U. S., at 573. And if the early Georgia cases cited by the majority establish any proposition, it is that the statute, as its language so clearly indicates, is aimed at

preventing precisely that type of personal, face-to-face, abusive and insulting language likely to provoke a violent retaliation—self-help, as we euphemistically call it—that the *Chaplinsky* case recognized could be validly prohibited. The facts of the case now before the Court demonstrate that the Georgia statute is serving that valid and entirely proper purpose. There is no persuasive reason to wipe the statute from the books, unless we want to encourage victims of such verbal assaults to seek their own private redress.

The Court apparently acknowledges that the conduct of the defendant in this case is not protected by the First Amendment, and does not contend that the Georgia statute is so ambiguous that he did not have fair notice that his conduct was prohibited. Nor does the Court deny that under normal principles of constitutional adjudication, appellee would not be permitted to attack his own conviction on the ground that the statute in question might in some hypothetical situation be unconstitutionally applied to the conduct of some party not before the Court. *United States* v. *Raines*, 362 U. S. 17, 21 (1960) (BRENNAN, J.). Instead, the Court relies on certain sweeping language contained in a few opinions for the proposition that, without regard to the nature of appellee's conduct, the statute in question must be invalidated on its face unless "it is not susceptible of application to speech, . . . that is protected by the First and Fourteenth Amendments."

Such an expansive statement of the technique of invalidating state statutes on their face because of their *substantial* overbreadth finds little in policy or the actual circumstances of the Court's past decisions to commend it. As the Court itself recognizes, if the First Amendment overbreadth doctrine serves any legitimate purpose, it is to allow the Court to invalidate statutes because their language demonstrates their potential for

sweeping improper applications posing a significant likelihood of deterring important First Amendment speech—not because of some insubstantial or imagined potential for occasional and isolated applications that go beyond constitutional bounds. Writing in a related context, Mr. Justice Black, only last Term, evidenced proper regard for normal principles of adjudication when he observed:

> "Procedures for testing the constitutionality of a statute 'on its face' . . . and for then enjoining all action to enforce the statute until the State can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges . . . when such an application of the statute would conflict with the Constitution. *Marbury* v. *Madison*, 1 Cranch 137 (1803). But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them. . . . [T]he task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary. . . ." *Younger* v. *Harris*, 401 U. S. 37, 52–53 (1971).

These observations were directed specifically to the practice of issuing federal court injunctions against state prosecutions, but the problem presented by this case is much the same.

Consistent with this properly restrained approach, the overbreadth decisions of this Court, including most of those relied on by the majority, have up to now invalidated state statutes on their face only when their potential for sweeping and improper application in important areas of First Amendment concern was far more apparent—both from the language of the statute and the subject matter of its coverage—than in this case. Indeed, in many of the Court's leading cases, the statute's improper sweep and deterrent potential were amply documented by the very facts of the case before the Court. *Cox* v. *Louisiana*, 379 U. S. 536 (1965), heavily relied on by the majority, for example, involved a "breach of the peace" conviction of a leader of black students on the basis of his participation in a peaceful demonstration protesting racial discrimination and a speech urging a "sit in" at segregated lunch counters. Although the Court held, in the alternative, that a statutory prohibition against congregating with others on a public sidewalk "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby" was unconstitutionally vague and overbroad, it is clear that its primary holding was that the statute had been unconstitutionally *applied* to appellant's conduct as revealed by the record before the Court. See 379 U. S., at 545–551. In contrast to today's opinion, which mentions the facts of the instant case only by way of passing in a footnote, the *Cox* opinion contained a careful recital and examination of the facts involved, and took care to observe that there was not in the record "any evidence . . . of 'fighting words.' See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568," 379 U. S., at 551. It was clear, therefore, that in *Cox* not only the language of the statute, but the facts of the very case before the Court, involving as it did protected political speech concerning a burning issue of great social concern, were cogent and persuasive evidence of the

statute's potential for sweeping and improper applications. By way of contrast, there is nothing in the language of the Georgia statute, or even in the isolated and ancient Georgia decisions relied on by the Court today that indicates that the statute involved in this case has ever been applied to suppress speech even remotely comparable to that involved in *Cox*.

There is no need to consider each of the other decisions relied on by the majority to reach its result in detail. Suffice it to say that such cases as *Ashton* v. *Kentucky*, 384 U. S. 195 (1966); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *NAACP* v. *Button*, 371 U. S. 415 (1963), and *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), arose out of factual situations and involved statutory language and objectives so far different from the instant case in terms of the actual and apparent danger to free expression that their relevance to the case at hand is at best strained and remote.*

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*Even assuming that the statute, on its face, were impermissibly overbroad, the Court does not satisfactorily explain why it must be invalidated in its entirety. To be sure, the Court notes that "we lack jurisdiction authoritatively to construe state legislation." But that cryptic statement hardly resolves the matter. The State of Georgia argues that the statute applies only to fighting words that *Chaplinsky* holds may be prohibited, and the Court apparently agrees that the statute would be valid if so limited. The Court should not assume that the Georgia courts, and Georgia prosecutors and police, would ignore a decision of this Court sustaining appellee's conviction narrowly and on the explicit premise that the statute may be validly applied only to "fighting words" as defined in *Chaplinsky*. See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 892, 894–896, and nn. 189, 190 (1970). Where such a clear line defining the area of constitutional application is available, the fact that the Court cannot authoritatively construe the state statute to excise its unconstitutional applications should make us more, not less, reluctant to strike it down on its face. This is especially so when the Court, by relying on old Georgia cases to bolster its conclusion, virtually concedes that the plain language does not offend the First Amendment.

The Court makes a mechanical and, I suggest, insensitive application of the overbreadth doctrine today. As MR. JUSTICE BLACKMUN correctly points out, it is difficult to imagine how a State could enact a statute more clearly and narrowly aimed at regulating the type of conduct that the unanimous holding of *Chaplinsky* tells us may be regulated. It is regrettable that one consequence of this holding may be to mislead some citizens to believe that fighting words of this kind may be uttered free of any legal sanctions.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

It seems strange, indeed, that in this day a man may say to a police officer, who is attempting to restore access to a public building, "White son of a bitch, I'll kill you" and "You son of a bitch, I'll choke you to death," and say to an accompanying officer, "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces," and yet constitutionally cannot be prosecuted and convicted under a state statute that makes it a misdemeanor to "use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . ." This, however, is precisely what the Court pronounces as the law today.

The Supreme Court of Georgia, when the conviction was appealed, unanimously held the other way. *Wilson* v. *State*, 223 Ga. 531, 156 S. E. 2d 446 (1967). Surely any adult who can read—and I do not exclude this appellee-defendant from that category—should reasonably expect no other conclusion. The words of Georgia Code § 26–6303 are clear. They are also concise. They are not, in my view, overbroad or incapable of being understood. Except perhaps for the "big" word "opprobrious"—and no point is made of its bigness—any

Georgia schoolboy would expect that this defendant's fighting and provocative words to the officers were covered by § 26–6303. Common sense permits no other conclusion. This is demonstrated by the fact that the appellee, and this Court, attack the statute, not as it applies to the appellee, but as it conceivably might apply to others who might utter other words.

The Court reaches its result by saying that the Georgia statute has been interpreted by the State's courts so as to be applicable in practice to otherwise constitutionally protected speech. It follows, says the Court, that the statute is overbroad and therefore is facially unconstitutional and to be struck down in its entirety. Thus Georgia apparently is to be left with no valid statute on its books to meet Wilson's bullying tactic. This result, achieved by what is indeed a very strict construction, will be totally incomprehensible to the State of Georgia, to its courts, and to its citizens.

The Court would justify its conclusion by unearthing a 66-year-old decision, *Fish* v. *State,* 124 Ga. 416, 52 S. E. 737 (1905), of the Supreme Court of Georgia, and two intermediate appellate court cases over 55 years old, *Jackson* v. *State,* 14 Ga. App. 19, 80 S. E. 20 (1913), and *Elmore* v. *State,* 15 Ga. App. 461, 83 S. E. 799 (1914), broadly applying the statute in those less permissive days, and by additional reference to (a) a 1956 Georgia intermediate appellate court decision, *Lyons* v. *State,* 94 Ga. App. 570, 95 S. E. 2d 478, which, were it the first and only Georgia case, would surely not support today's decision, and (b) another intermediate appellate court decision, *Samuels* v. *State,* 103 Ga. App. 66, 118 S. E. 2d 231 (1961), relating, not to § 26–6303, but to another statute.

This Court appears to have developed its overbreadth rationale in the years since these early Georgia cases. The State's statute, therefore, is condemned because the

State's courts have not had an opportunity to adjust to this Court's modern theories of overbreadth.

I wonder, now that § 26–6303 is voided, just what Georgia can do if it seeks to proscribe what the Court says it still may constitutionally proscribe. The natural thing would be to enact a new statute reading just as § 26–6303 reads. But it, too, presumably would be overbroad unless the legislature would add words to the effect that it means only what this Court says it may mean and no more. See Criminal Code of Georgia § 26–2610 (1969).

I cannot join the Court in placing weight upon the fact that Judge Smith of the United States District Court had been a Georgia practitioner and that Judge Morgan of the Court of Appeals had also practiced in that State. After all, each of these Georgia federal judges is bound by this Court's self-imposed straitjacket of the overbreadth approach. Judge Smith's personal attitude is clear, for he said:

> "[T]his Court does not see any policy reasons for upholding the right of a person to use the type of language expressed by this petitioner. It strains the concept of freedom of speech out of proportion when it is argued that such language is and should be protected." 303 F. Supp. 952, 955 (ND Ga. 1969).

And the Court of Appeals joined in this comment when, on the point at issue here, it merely agreed "with the well reasoned opinion of the district court." 431 F. 2d 855, 859 (CA5 1970).

For me, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), was good law when it was decided and deserves to remain as good law now. A unanimous Court, including among its members Chief Justice Stone and Justices Black, Reed, DOUGLAS, and Murphy, obviously thought

it was good law. But I feel that by decisions such as this one and, indeed, *Cohen* v. *California*, 403 U. S. 15 (1971), the Court, despite its protestations to the contrary, is merely paying lip service to *Chaplinsky*. As the appellee states in a footnote to his brief, p. 14, "Although there is no doubt that the state can punish 'fighting words' this appears to be about all that is left of the decision in *Chaplinsky*." If this is what the overbreadth doctrine means, and if this is what it produces, it urgently needs re-examination. The Court has painted itself into a corner from which it, and the States, can extricate themselves only with difficulty.

LYNCH ET AL. *v.* HOUSEHOLD FINANCE CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 70-5058. Argued December 7, 1971—Decided March 23, 1972

Appellee Household Finance Corp. sued appellant Lynch in state court alleging nonpayment of a promissory note, and, prior to serving her with process, garnished her savings account under Connecticut law authorizing summary pre-judicial garnishment. Appellant challenged the validity of the state statutes under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and sought declaratory and injunctive relief under 42 U. S. C. § 1983 and its jurisdictional counterpart, 28 U. S. C. § 1343 (3). The District Court dismissed the complaint on the grounds (1) that it lacked jurisdiction under § 1343 (3), as that section applies only if "personal" rights, as opposed to "property" rights, are impaired, and (2) that relief was barred by 28 U. S. C. § 2283, proscribing injunctions against state court proceedings. *Held:*

1. There is no distinction between personal liberties and proprietary rights with respect to jurisdiction under 28 U. S. C. § 1343 (3). Pp. 542–552.

(a) Neither the language nor the legislative history of that section distinguishes between personal and property rights. Pp. 543–546.

(b) There is no conflict between that section and 28 U. S. C. § 1331, and the legislative history of § 1331 does not provide any basis for narrowing the scope of § 1343 (3) jurisdiction. Pp. 546–550.

(c) It would be virtually impossible to apply a "personal liberties" limitation on § 1343 (3) as there is no real dichotomy between personal liberties and property rights. It has long been recognized that rights in property are basic civil rights. Pp. 550–552.

2. Prejudgment garnishment under the Connecticut statutes is levied and maintained without the participation of the state courts, and thus an injunction against such action is not barred by the provisions of 28 U. S. C. § 2283. Pp. 552–556.

318 F. Supp. 1111, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 556. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

David M. Lesser argued the cause for appellants. With him on the briefs was *William H. Clendenen, Jr.*

Richard G. Bell argued the cause for appellees. With him on the brief for appellees Household Finance Corp. et al. were *Charles A. Pulaski, Jr.*, and *David W. Goldman*. *Robert K. Killian*, Attorney General of Connecticut, and *Raymond J. Cannon* and *Robert L. Hirtle, Jr.*, Assistant Attorneys General, filed a brief for Barrett, Deputy Sheriff.

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1968, the appellant, Mrs. Dorothy Lynch, a resident of New Haven, Connecticut, directed her employer to deposit $10 of her $69 weekly wage in a credit union savings account. In 1969, appellee Household Finance Corp. sued Mrs. Lynch for $525 in a state court, alleging nonpayment of a promissory note. Before she was served with process, the appellee corporation garnished her savings account under the provisions of Connecticut law that authorize summary pre-judicial garnishment at the behest of attorneys for alleged creditors.[1]

The appellant then brought this class action in a federal district court against Connecticut sheriffs who levy on bank accounts and against creditors who in-

[1] The garnishment was levied pursuant to Conn. Gen. Stat. Rev. § 52–329. For a further description of Connecticut's statutory garnishment scheme, see Part II of this opinion, *infra*.

voke the garnishment statute.[2] Mrs. Lynch alleged that she had no prior notice of the garnishment and no opportunity to be heard. She claimed that the state statutes were invalid under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and sought declaratory and injunctive relief pursuant to 42 U. S. C. § 1983[3] and its jurisdictional counterpart, 28 U. S. C. § 1343 (3).[4] A district court of three judges was convened to hear the claim under 28 U. S. C. §§ 2281 and 2284.

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[2] The second named appellant, Norma Toro, had her checking account garnished by her former landlord, one Eugene Composano. Subsequently Composano released the garnishment. An issue of mootnesss—which was not resolved by the District Court—is thus presented. We do not, however, reach this issue. Appellant Lynch had a savings account garnished, appellant Toro a checking account. The considerations applicable to one type of account seem identical to those applicable to the other. In this opinion, therefore, we shall only refer to the case of appellant Lynch.

An issue is also raised as to the propriety of the classes purported to be represented by the appellants and appellees. In view of our disposition of the case, we leave this issue for consideration by the District Court upon remand.

[3] The statute provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[4] The statute states in relevant part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . ."

The District Court did not reach the merits of the case. It dismissed the complaint without an evidentiary hearing on the grounds that it lacked jurisdiction under § 1343 (3) and that relief was barred by the statute prohibiting injunctions against state court proceedings, 28 U. S. C. § 2283. 318 F. Supp. 1111. We noted probable jurisdiction, pursuant to 28 U. S. C. § 1253,[5] to consider the jurisdictional issues presented. 401 U. S. 935.

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[5] The appellees argue that we have no jurisdiction to consider this case on direct appeal from the three-judge District Court, 28 U. S. C. § 1253, because the court did not reach the merits of the appellant's claim for an injunction but dismissed for lack of subject matter jurisdiction.

But whether a direct appeal will lie depends on "whether the three-judge [court was] properly convened." *Moody* v. *Flowers*, 387 U. S. 97, 99. This action challenges the constitutionality of a state statute and seeks to enjoin its enforcement. The questions it raises are substantial. It, therefore, meets the requirements for convening a three-judge court. 28 U. S. C. § 2281; *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715. This case may, therefore, be distinguished from *Perez* v. *Ledesma*, 401 U. S. 82, upon which the appellees rely. In that case, we had no power to consider the merits of an appeal because the ordinance in question was neither a state statute nor of statewide application. *Perez*, *supra*, at 89 (concurring opinion). When a state statute is challenged and injunctive relief sought, we have granted direct review pursuant to § 1253 although three-judge courts dismissed for lack of subject-matter jurisdiction, *Baker* v. *Carr*, 369 U. S. 186, *Abernathy* v. *Carpenter*, 373 U. S. 241, *Doud* v. *Hodge*, 350 U. S. 485, *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, or because relief was thought to be barred by 28 U. S. C. § 2283, *Cameron* v. *Johnson*, 390 U. S. 611.

The appellees also note that § 1253 permits appeals to this Court only from orders "granting or denying . . . an interlocutory or permanent injunction . . . ." They argue that since the three-judge court never considered whether an injunction should be granted an appeal should lie to the Court of Appeals. The three-judge court, however, entered a judgment "denying all relief sought by plaintiffs." We therefore have jurisdiction to consider the claims presented.

We hold, for the reasons that follow, that neither § 1343 (3) nor § 2283 warranted dismissal of the appellant's complaint. Accordingly, we remand the case to the District Court for consideration of the remaining issues in this litigation.

I

In dismissing the appellant's complaint, the District Court held that § 1343 (3) applies only if "personal" rights, as opposed to "property" rights, are allegedly impaired. The court relied on the decision of the Court of Appeals for the Second Circuit in *Eisen* v. *Eastman*, 421 F. 2d 560, 563, which rested, in turn, on Mr. Justice Stone's well-known opinion a generation ago in *Hague* v. *CIO*, 307 U. S. 496, 531. See also, *e. g.*, *Weddle* v. *Director*, 436 F. 2d 342; *Bussie* v. *Long*, 383 F. 2d 766; *Howard* v. *Higgins*, 379 F. 2d 227.

This Court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of § 1343 (3) jurisdiction.[6] Today we expressly reject that distinction.

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[6] The appellees cite three cases decided by this Court before *Hague* v. *CIO*, 307 U. S. 496, that, they say, support the limitation of § 1343 (3) jurisdiction to claims of deprivation of personal liberties. *Carter* v. *Greenhow*, 114 U. S. 317; *Pleasants* v. *Greenhow*, 114 U. S. 323; *Holt* v. *Indiana Mfg. Co.*, 176 U. S. 68. The appellees also rely on two recent affirmances, without opinion, of decisions by three-judge district courts dismissing § 1343 (3) suits on the ground that the rights allegedly infringed were proprietary. *Hornbeak* v. *Hamm*, 393 U. S. 9, aff'g 283 F. Supp. 549 (MD Ala. 1968); *Abernathy* v. *Carpenter*, 373 U. S. 241, aff'g 208 F. Supp. 793 (WD Mo. 1962).

All of these cases involved constitutional challenges to the collection of state taxes. Congress has treated judicial interference with the enforcement of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a

A

Neither the words of § 1343 (3) nor the legislative history of that provision distinguishes between personal and property rights. In fact, the Congress that enacted the predecessor of §§ 1983 and 1343 (3) seems clearly to have intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law.

This Court has traced the origin of § 1983 and its jurisdictional counterpart to the Civil Rights Act of 1866, 14 Stat. 27. *Adickes* v. *Kress & Co.*, 398 U. S. 144, 162–163; *Monroe* v. *Pape*, 365 U. S. 167, 171, 183–185.[7] That Act guaranteed "broad and sweeping . . . pro-

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plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341.

We have repeatedly barred anticipatory federal adjudication of the validity of state tax laws. *Dows* v. *City of Chicago*, 11 Wall. 108; *Matthews* v. *Rodgers*, 284 U. S. 521; *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293; see also *Perez* v. *Ledesma*, 401 U. S., at 126–127, n. 17 (opinion of BRENNAN, J.). The decisions cited by appellees may, therefore, be seen as consistent with congressional restriction of federal jurisdiction in this special class of cases, and with longstanding judicial policy.

[7] Section 2 of the 1866 Act was the model for § 1 of the Civil Rights Act of 1871, 17 Stat. 13. See n. 9, *infra*. Sections 1983 and 1343 (3) are direct descendants of § 1 of the Act of 1871. In 1874, Congress consolidated the various federal statutes at large under separate titles in the Revised Statutes in order to codify existing law. In the process, the substantive provision of § 1 of the 1871 Act became separated from its jurisdictional counterpart. Rev. Stat. § 1979. Although the original substantive provision had protected rights, privileges, or immunities secured by the Constitution, the provision in the Revised Statutes was enlarged to provide protection for rights, privileges, or immunities secured by federal law as well.

Originally, suits under § 1 of the 1871 Act could be brought in either circuit or district court. After codification in 1874, the juris-

tection" to basic civil rights. *Sullivan* v. *Little Hunting Park*, 396 U. S. 229, 237. Acquisition, enjoyment, and alienation of property were among those rights. *Jones* v. *Mayer Co.*, 392 U. S. 409, 432.[8]

The Fourteenth Amendment vindicated for all persons the rights established by the Act of 1866. *Monroe, supra,* at 171; *Hague, supra,* at 509–510. "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." *Shelley* v. *Kraemer,* 334 U. S. 1, 10. See also, *Buchanan* v. *Warley,* 245 U. S. 60, 74–79; H. Flack, The Adoption of the Fourteenth Amendment 75–78, 81, 90–97 (1908); J. tenBroek, The Antislavery Origins of the Fourteenth Amendment (1951).

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dictional grant to the district courts was identical in scope with the expanded substantive provision, Rev. Stat. § 563 (12). Circuit court jurisdiction was limited to claimed deprivations of rights, privileges, or immunities secured by the Constitution or by any Act of Congress "providing for equal rights." Rev. Stat. § 629 (16). In 1911, when Congress abolished the circuit courts' original jurisdiction and merged the two jurisdictional sections into what is now § 1343 (3), the "equal rights" limitation was retained in the revised jurisdictional grant. Act of Mar. 3, 1911, 36 Stat. 1087. Despite the different wording of the substantive and jurisdictional provisions, when the § 1983 claim alleges constitutional violations, § 1343 (3) provides jurisdiction and both sections are construed identically. *Douglas* v. *City of Jeannette,* 319 U. S. 157, 161.

[8] See generally Report of C. Shurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865); Cong. Globe, 39th Cong., 1st Sess., 3034–3035 and App. 219 (1866); J. tenBroek, The Antislavery Origins of the Fourteenth Amendment (1951); Frank & Munro, The Original Understanding of "Equal Protection of the Laws," 50 Col. L. Rev. 131, 144–145 (1950).

The broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakably evident in the legislative history of § 1 of the Civil Rights Act of 1871, 17 Stat. 13, the direct lineal ancestor of §§ 1983 and 1343 (3). Not only was § 1 of the 1871 Act derived from § 2 of the 1866 Act,[9] but the 1871 Act was passed for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment." 17 Stat. 13. And the rights that Congress sought to protect in the Act of 1871 were described by the chairman of the House Select Committee that drafted the legislation as "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." Cong. Globe, 42d Cong., 1st Sess., App. 69 (1871) (Rep. Shellabarger, quoting from *Corfield* v. *Coryell,* 6 F. Cas. 546, 551–552 (No. 3230) (CCED Pa.)).

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[9] Section 2 of the 1866 Civil Rights Act, 14 Stat. 27, currently codified in slightly different form as 18 U. S. C. § 242, read in pertinent part:

"[A]ny person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State . . . to the deprivation of any right *secured or protected* by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude . . . shall be deemed guilty of a misdemeanor . . . ." (Emphasis supplied.)

Section 2 provided criminal penalties for any violation of § 1 of the 1866 Act. *Screws* v. *United States,* 325 U. S. 91, 98–100. The latter section enumerated the rights the Act protected, including, *inter alia,* the right "to make and enforce contracts, to sue . . . to inherit, purchase, lease, sell, hold, and convey real and personal property. . . ."

Representative Shellabarger, chairman of the House Select Committee which drafted the Civil Rights Act of 1871, stated that

"The model for [§ 1 of the 1871 Act] will be found in the second section of the act of April 9, 1866, known as the 'civil rights act.' That section provides a criminal proceeding in identically the same case as this one provides a civil remedy . . . ." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871).

That the protection of property as well as personal rights was intended is also confirmed by President Grant's message to Congress urging passage of the legislation,[10] and by the remarks of many members of Congress during the legislative debates.[11]

B

In 1875, Congress granted the federal courts jurisdiction of "all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States." 18 Stat. 470. Unlike § 1343 (3), this general federal-question provision, the forerunner of 28 U. S. C. § 1331, required that a minimum amount in controversy be alleged and proved.[12] Mr. Justice Stone's opinion in *Hague, supra,* as well as the federal court decisions that followed it, *e. g., Eisen* v. *Eastman,* 421 F. 2d 560, reflect the view that there is an apparent

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[10] The President, in a message dated March 23, 1871, stated:

"A condition of affairs now exists in some States of the Union rendering life and property insecure . . . . I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States." Cong. Globe, 42d Cong., 1st Sess., 244.

[11] See, *e. g.,* Cong. Globe, 42d Cong., 1st Sess., 332–334 (Rep. Hoar); 369–370 (Rep. Monroe); 375–376 (Rep. Lowe); 429 (Rep. Beatty); 448 (Rep. Butler); 459–461 (Rep. Coburn); 475–476 (Rep. Dawes); 501 (Sen. Frelinghuysen); 568 (Sen. Edmunds); 577 (Sen. Carpenter); 607 (Sen. Pool); 650–651 (Sen. Sumner); 653 (Sen. Osborn); 666 (Sen. Spencer).

See also S. Rep. No. 1, 42d Cong., 1st Sess. (1871). Several months before the passage of the Civil Rights Act of 1871, a Senate Committee was formed to investigate conditions in the Southern States. One purpose of the investigation was to "ascertain . . . whether persons and property are secure. . . ." *Id.,* at II.

[12] The jurisdictional amount was increased from $500 to $2,000 by the Act of Mar. 3, 1887, 24 Stat. 552; to $3,000 by the Act of Mar. 3, 1911, 36 Stat. 1091; and to $10,000 by the Act of July 25, 1958, 72 Stat. 415.

conflict between §§ 1343 (3) and 1331,[13] *i. e.*, that a broad reading of § 1343 (3) to include all rights secured by the Constitution would render § 1331, and its amount-in-controversy requirement, superfluous. These opinions sought to harmonize the two jurisdictional provisions by construing § 1343 (3) as conferring federal jurisdiction of suits brought under § 1983 only when the right asserted is personal, not proprietary.

The initial failure of this reasoning is that the supposed conflict between §§ 1343 (3) and 1331 simply does not exist. Section 1343 (3) applies only to alleged infringements of rights under "color of . . . State law," whereas § 1331 contains no such requirement. Thus, for example, in suits against federal officials for alleged deprivations of constitutional rights, it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction. See *Oestereich* v. *Selective Service Board,* 393 U. S. 233; *Bivens* v. *Six Unknown Named Agents,* 403 U. S. 388.

But the more fundamental point to be made is that any such contraction of § 1343 (3) jurisdiction is not

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[13] The plaintiffs in *Hague* brought suit in a federal district court to enjoin enforcement of city ordinances prohibiting the distribution of printed matter and the holding of public meetings without a permit. They alleged that the ordinances violated the union members' right of free speech and assembly. Both the District Court and the Court of Appeals found jurisdiction under §§ 1331 and 1343 (3). This Court reversed as to jurisdiction under § 1331, since the plaintiffs had failed to establish the requisite amount in controversy. Although no opinion commanded a majority, jurisdiction under § 1343 (3) was upheld. Mr. Justice Roberts, writing the lead opinion, expressed the view that the reference in § 1343 to "any right, privilege or immunity secured by the Constitution" should be interpreted to cover only alleged violations of the Privileges and Immunities Clause of the Fourteenth Amendment. In *Monroe* v. *Pape,* 365 U. S. 167, 170–171, we rejected such a narrow reading of similar language in § 1983.

supported by the legislative history of § 1331. The 1875 Act giving the federal courts power to hear suits arising under Art. III, § 2, of the Constitution was, like the Act of 1871, an expansion of national authority over matters that, before the Civil War, had been left to the States. F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928); *Zwickler* v. *Koota*, 389 U. S. 241, 245–248; Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639, 645 (1942). The Act, therefore, is "clearly . . . part of, rather than an exception to, the trend of legislation which preceded it." Chadbourn & Levin, *supra*, at 645; *Zwickler, supra*. There was very little discussion of the measure before its enactment, in contrast to the extensive congressional debate that attended the passage of the Act of 1871.[14] And there is, as a result, no indication whatsoever that Congress, in a rather hastily passed measure, intended to narrow the scope of a provision passed four years earlier as part of major civil rights legislation.[15]

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[14] "[A] study of the history of the bill as revealed by the Congressional Record yields no reason for its enactment at that time, and may even be said to raise a strong presumption that it was 'sneak' legislation. It was originally introduced in the House of Representatives in the form of a bill to amend the removal statute." Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639, 642–643 (1942). Nonetheless, the passage of the Act, despite the lack of debate, has been regarded as the "culmination of a movement . . . to strengthen the Federal Government against the states." F. Frankfurter & J. Landis, The Business of the Supreme Court 65 n. 34 (1928). See also Maury, The Late Civil War, Its Effect on Jurisdiction, and on Civil Remedies Generally, 23 Am. L. Reg. 129 (1875).

[15] As noted, Congress in 1875 also enlarged the scope of § 1983's predecessor to protect rights secured by federal law as well as rights secured by the Constitution. See n. 7, *supra*. Moreover, when Congress increased the amount-in-controversy requirement to $3,000 in 1911, 36 Stat. 1091, there was no indication that jurisdiction

The "cardinal rule . . . that repeals by implication are not favored," *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *Jones* v. *Mayer Co.*, 392 U. S., at 437, thus counsels a refusal to pare down § 1343 (3) jurisdiction—and the substantive scope of § 1983—by means of the distinction between personal liberties and property rights, or in any other way. The statutory descendants of § 1 of the Civil Rights Act of 1871 must be given the meaning and sweep that their origins and their language dictate.[16]

Moreover, although the purpose of the amount-in-controversy requirement is to reduce congestion in the federal courts, S. Rep. No. 1830, 85th Cong., 2d Sess. (1958), Congress has substantially lessened its importance with respect to § 1331 by passing many statutes that confer federal-question jurisdiction without an amount-in-controversy requirement.[17] So it was that

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under what is now § 1343 (3) was to be reduced. In fact, the legislation explicitly preserved the exemption of action brought under § 1343 (3)'s predecessor from the amount-in-controversy requirement.

[16] In *United States* v. *Price*, 383 U. S. 787, 797, we interpreted the phrase "rights, privileges, or immunities secured . . . by the Constitution or laws of the United States," contained in 18 U. S. C. § 242, to embrace "*all* of the Constitution and laws of the United States." The similar language in §§ 1983 and 1343 (3) was originally modeled on § 242's predecessor, § 2 of the Civil Rights Act of 1866. See n. 9, *supra*. In *Price*, *supra*, we said that "[w]e are not at liberty to seek ingenious analytical instruments" to avoid giving a congressional enactment the scope that its language and origins require. *Id.*, at 801.

[17] A series of particular statutes grant jurisdiction, without regard to the amount in controversy, in virtually all areas that otherwise would fall under the general federal-question statute. Such special statutes cover: admiralty, maritime, and prize cases, 28 U. S. C. § 1333; bankruptcy matters and proceedings, 28 U. S. C. § 1334; review of orders of the Interstate Commerce Commission, 28 U. S. C. § 1336; cases arising under any Act of Congress regulating commerce,

when Congress increased the jurisdictional amount from $3,000 to $10,000, Act of July 25, 1958, 72 Stat. 415, it made clear that its primary concern was to reduce the federal judiciary's workload with regard to cases arising under federal diversity jurisdiction, 28 U. S. C. § 1332, not under § 1331.[18]

A final, compelling reason for rejecting a "personal liberties" limitation upon § 1343 (3) is the virtual im-

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28 U. S. C. § 1337; patent, copyright, and trademark cases, 28 U. S. C. § 1338; postal matters, 28 U. S. C. § 1339; internal revenue and custom duties actions, 28 U. S. C. § 1340; election disputes, 28 U. S. C. § 1344; cases in which the United States is a party, 28 U. S. C. §§ 1345, 1346, 1347, 1348, 1349, 1358, and 1361; certain tort actions by aliens, 28 U. S. C. § 1350; actions on bonds executed under federal law, 28 U. S. C. § 1352; cases involving Indian allotments, 28 U. S. C. § 1353; and injuries under federal law, 28 U. S. C. § 1357.

[18] "While this bill applies the $10,000 minimum limitation to cases involving Federal questions, its effect will be greater on diversity cases since many of the so-called Federal question cases will be exempt from its provisions." S. Rep. No. 1830, 85th Cong., 2d Sess., 6 (1958). The Senate report was echoing the finding of the Judicial Conference's Committee on Jurisdiction and Venue that raising the jurisdictional amount would "have significant effect mainly upon diversity cases." *Id.*, at 22.

Recent studies have demonstrated that the amount-in-controversy requirement still has "relatively little impact on the volume of federal question litigation." American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 172, 489–492 (1969). See also, Warren, Address to the American Law Institute, 1960, 25 F. R. D. 213; C. Wright, Law of Federal Courts 107 (2d ed. 1970). Information from the Administrative Office of the United States Courts shows that a majority of private federal-question cases involve less than $10,000. American Law Institute, *supra*, at 491.

Although litigation involving federal civil rights is increasing, such actions constituted only 4.6% of the suits instituted in district courts during the 1970 fiscal year. Administrative Office of the United States Courts, 1970 Report, II–31.

possibility of applying it.[19] The federal courts have been particularly bedeviled by "mixed" cases in which both personal and property rights are implicated, and the line between them has been difficult to draw with any consistency or principled objectivity.[20] The case

[19] As noted above, we have never adopted the property rights-personal liberties test for § 1343 (3) jurisdiction. In *Eisen* v. *Eastman*, 421 F. 2d 560, the Court of Appeals for the Second Circuit said that application of the test would bar many welfare claims. *Id.*, at 566 n. 10. We have, however, continually found § 1343 (3) jurisdiction in such cases. See, *e. g.*, *California Department of Human Resources* v. *Java*, 402 U. S. 121; *Rosado* v. *Wyman*, 397 U. S. 397; *King* v. *Smith*, 392 U. S. 309; *Goldberg* v. *Kelly*, 397 U. S. 254; *Dandridge* v. *Williams*, 397 U. S. 471; *Damico* v. *California*, 389 U. S. 416.

See also *Rinaldi* v. *Yeager*, 384 U. S. 305; *Swarb* v. *Lennox*, *ante*, p. 191; *Lindsey* v. *Normet*, *ante*, p. 56. These cases, arguably, involved only deprivations of property, but we found § 1343 (3) jurisdiction nonetheless.

[20] Difficulty in application has been one source of the commentators' dissatisfaction with the "personal liberties" limitation. See generally Note, 24 Vand. L. Rev. 990 (1971); Laufer, *Hague* v. *C. I. O.*: Mr. Justice Stone's Test of Federal Jurisdiction—A Reappraisal, 19 Buff. L. Rev. 547 (1970); Note, 1970 Duke L. J. 819; Note, 43 N. Y. U. L. Rev. 1208 (1968); Note, 66 Harv. L. Rev. 1285 (1953).

The federal courts have produced inconsistent results regarding § 1343 (3) jurisdiction of welfare claims. Compare *Roberts* v. *Harder*, 440 F. 2d 1229, with *Alvarado* v. *Schmidt*, 317 F. Supp. 1027. See also n. 19, *supra*. Yet, without always explaining why such interests are "personal" rather than "proprietary," courts have consistently found civil rights jurisdiction over suits alleging discrimination in the issuance of business licenses. See, *e. g.*, *Barnes* v. *Merritt*, 376 F. 2d 8; *Glicker* v. *Michigan Liquor Control Comm'n*, 160 F. 2d 96. Similarly, claims involving discrimination in employment, *e. g.*, *Birnbaum* v. *Trussell*, 371 F. 2d 672, or termination of leases in public housing projects, *e. g.*, *Escalera* v. *New York City Housing Authority*, 425 F. 2d 853, are often found cognizable under § 1343 (3). How such "personal" interests are to be distinguished from the "property" interest in wages deposited in a savings account, as in this case, is not readily discernible. Compare this case with *Santiago* v. *McElroy*, 319 F. Supp. 284.

before us presents a good example of the conceptual difficulties created by the test.[21]

Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, Of Civil Government 82–85 (1924); J. Adams, A Defence of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121–132 (1942); 1 W. Blackstone, Commentaries *138–140. Congress recognized these rights in 1871 when it enacted the predecessor of §§ 1983 and 1343 (3). We do no more than reaffirm the judgment of Congress today.

II

Under 28 U. S. C. § 2283, a federal court may not "grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The District Court relied upon this statute as an alternative ground for the dis-

[21] The District Court found that access to funds held in a savings account was indistinguishable from simple ownership of money. Thus garnishment of that account did not infringe personal rights. Mrs. Lynch, however, alleged that because of the garnishment she was unable to pay her rent on time and encountered difficulty maintaining her family on a minimally adequate diet. If these allegations are true, Mrs. Lynch's personal liberty could be profoundly affected by garnishment of her savings.

missal of the appellant's complaint. The appellant contends that § 2283 is inapplicable to this case because prejudgment garnishment under Conn. Gen. Stat. Rev. § 52–329 [22] is not a proceeding in state court. We agree.[23]

In Connecticut, garnishment is instituted without judicial order. *Ibid.;* 1 E. Stephenson, Connecticut Civil Procedure 151 (2d ed. 1970).[24] The levy of garnishment—usually effected by a deputy sheriff—does not confer jurisdiction on state courts and may, in fact,

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[22] The statute provides:

"When the effects of the defendant in any civil action in which a judgment or decree for the payment of money may be rendered are concealed in the hands of his agent or trustee so that they cannot be found or attached, or when a debt is due from any person to such defendant, or when any debt, legacy or distributive share is or may become due to such defendant from the estate of any deceased person or insolvent debtor, the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least twelve days in the case of the superior court or the court of common pleas, or six days in the case of the circuit court, before the session of the court to which it is returnable, with such agent, trustee or debtor of the defendant, or, as the case may be, with the executor, administrator or trustee of such estate, or at the usual place of abode of such garnishee; and from the time of leaving such copy all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover."

[23] Cf. *Roudebush* v. *Hartke, ante,* p. 15.

[24] Garnishment occurs at the beginning of the suit upon the direction of the plaintiff's lawyer, acting as a Commissioner of the Superior Court. Conn. Gen. Stat. Rev. §§ 51–85, 52–89. "The plaintiff or his attorney merely includes in his writ of summons a direction to the sheriff to make an attachment or serve garnishment process." 1 E. Stephenson, Connecticut Civil Procedure 151 (2d ed. 1970).

occur prior to commencement of an alleged creditor's suit. *Young* v. *Margiotta*, 136 Conn. 429, 433, 71 A. 2d 924, 926. Despite the state court's control over the plaintiff's docketed case, garnishment is "distinct from and independent of that action." *Potter* v. *Appleby*, 136 Conn. 641, 643, 73 A. 2d 819, 820. The garnished property is secured, not under authority of the court, but merely in the hands of the garnishee. Conn. Gen. Stat. Rev. § 52–329. Prejudgment garnishment is thus levied and maintained without the participation of the state courts.

In this case, the appellant sought to enjoin garnishment proceedings, not the finance company's suit on the promissory note. The District Court noted that "garnishment may be separated from the underlying in personam action," but held that § 2283 was a bar because the interference with existing creditors' suits caused by such an injunction "probably would be substantial." 318 F. Supp., at 1115. According to the appellees, interference would occur because garnishment is necessary to make any eventual judgment in the pending state suit effective. *Hill* v. *Martin*, 296 U. S. 393, 403.

This argument is not persuasive in the context of the Connecticut prejudgment garnishment scheme. Garnishment *might* serve to make a *subsequent* judgment effective. Cf. *Hill, supra; Manufacturers Record Publishing Co.* v. *Lauer*, 268 F. 2d 187, cert. denied, 361 U. S. 913; *Furnish* v. *Board of Medical Examiners of California*, 257 F. 2d 520, cert denied, 358 U. S. 882. But the garnishment was, in this case, an action taken by private parties who were not proceeding under a court's supervision [25] and who were using, as agents,

[25] The fact that the plaintiffs' attorneys are, formally, officers of the court does not convert the Connecticut garnishment process into a state court proceeding for § 2283 purposes, since the attorneys

state officials who were themselves not acting pursuant to a court order or under a court's authority.

In *Hill, supra,* we said that the "proceeding" that a federal court is forbidden to enjoin "includes all steps taken or which may be taken *in the state court or by its officers* from the *institution* to the close of the final process." *Id.,* at 403 (emphasis supplied). In this case, the garnishment occurred before the appellee corporation had served the appellant with process.

More important, the state court and its officers are insulated from control over the garnishment. Connecticut appears to be one of the few States authorizing an attorney for an alleged creditor to garnish or attach property without any participation by a judge or clerk of the court. Stephenson, *supra,* at 230. A person whose account has been seized can get only minimal relief at best.[26] The state courts have held that they cannot enjoin a garnishment on the ground that it was levied unconstitutionally. *Michael's Jewelers* v. *Handy,* 6 Conn. Cir. 103, 266 A. 2d 904; *Harris* v. *Barone,* 147 Conn. 233, 158 A. 2d 855. One assumption underlying § 2283 is that state courts will vindicate constitutional claims as fairly and efficiently as federal courts. But this assumption cannot obtain when the doors of the

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have complete discretion to issue a writ. See n. 24, *supra; Sharkiewicz* v. *Smith,* 142 Conn. 410, 114 A. 2d 691; *Sachs* v. *Nussenbaum,* 92 Conn. 682, 104 A. 393.

[26] The courts have no authority to inquire into the probable validity of the creditor's claim, or whether special circumstances warrant provisional security for an alleged creditor. *Sachs* v. *Nussenbaum,* 92 Conn., at 689, 104 A., at 395. Prior to the termination of the litigation, a garnishment may be reduced or dissolved only upon a showing that the garnishment is excessive—*i. e.,* in excess of the creditor's apparent claim—or upon substitution of a bond with surety. Conn. Gen. Stat. Rev. §§ 52–302 and 52–304. *Black Watch Farms* v. *Dick,* 323 F. Supp. 100, 101–102. This involvement has been termed "meager." Stephenson, *supra,* at 154.

state courts are effectively closed to a person seeking to enjoin a garnishment on constitutional grounds.

Because of the extrajudicial nature of Connecticut garnishment, an injunction against its maintenance is not, therefore, barred by the terms of § 2283. In light of this conclusion, we need not decide whether § 1983 is an exception to § 2283 "expressly authorized by Act of Congress." We have explicitly left that question open in other decisions.[27] And we may put it to one side in this case because the state act that the federal court was asked to enjoin was not a proceeding "in a State court" within the meaning of § 2283.

We conclude, therefore, that the District Court had jurisdiction to entertain the appellant's suit for an injunction under § 1983. Accordingly, the judgment before us is reversed, and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

I agree with the Court that federal jurisdiction under 28 U. S. C. § 1343 is not limited to the adjudication of personal rights and if the disposition of this case turned solely on that issue I would without reservation join in the majority opinion. But I cannot agree either with the approach that the majority takes to the anti-

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[27] See *Dombrowski* v. *Pfister*, 380 U. S. 479, 484 n. 2; *Cameron* v. *Johnson*, 390 U. S., at 613 n. 3; *Younger* v. *Harris*, 401 U. S. 37, 54. The circuits have divided on the question. Cf., *e. g.*, *Cooper* v. *Hutchinson*, 184 F. 2d 119, and *Baines* v. *City of Danville*, 337 F. 2d 579.

injunction statute, 28 U. S. C. § 2283, or its conclusion that the statute does not bar this suit. I do not mean to suggest that appellants' due process attack on the Connecticut garnishment statute is not substantial. It obviously is. *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969). Nevertheless, in my view, appellants should be required to press their constitutional attack in the state courts.

In Connecticut, garnishment or attachment is one method of beginning a lawsuit. Conn. Gen. Stat. Rev. § 52–329; 1 E. Stephenson, Connecticut Civil Procedure 156–157, 232–237 (2d ed. 1970). Of course, the requisite personal service upon a defendant is necessary to obtain *in personam* jurisdiction, Conn. Gen. Stat. Rev. § 52–54, as well as to secure an effective garnishment, Stephenson, *supra*, at 244, but as a matter of right in certain kinds of civil actions a plaintiff may simultaneously garnish a defendant's bank account and serve a summons upon the defendant, together with a complaint stating the nature of the underlying action. Conn. Gen. Stat. Rev. § 52–329. A state court obtains jurisdiction of the action and of questions concerning the garnishment when return of process is made to that court. Stephenson, *supra*, at 67. Garnishment is "ancillary to the main action for damages and cannot exist without such action." *Id.*, at 143. Its purpose, as the majority notes, is to secure property that will thus be made available for the satisfaction of a judgment. *Ibid.* A writ of garnishment may be issued by a judge of the court of jurisdiction, Conn. Gen. Stat. Rev. § 52–89 (Supp. 1969), but because garnishment in Connecticut, unlike most other States, is a matter of right and requires no prior judicial determination, the writ may also be issued by a court clerk or licensed attorney. Conn. Gen. Stat. Rev. § 51–85. In either

case, the matter is accomplished simply by completing a form.

Appellant Lynch brought this federal action to enjoin the garnishment more than seven months after the writ had been executed, the summons and complaint served, process returned, and the case docketed in Connecticut court. At the earliest moment that a federal injunction could have issued the state court proceeding was well under way. Despite this, the majority purports to sever the garnishment from the action that underlies it. The Court reasons that Connecticut garnishment is not a proceeding in state court because it is carried out by private parties not acting pursuant to a court order. *Ante*, at 554–555.

If the majority means that garnishment is a severable matter, independent of the main suit and for that reason outside of § 2283, then I would suppose it permissible for a federal court to enjoin any garnishment or attachment, whether obtained at the inception of a lawsuit, while it is in progress, or after judgment and for the purpose of execution. This approach to the anti-injunction statute, articulated in *Simon* v. *Southern R. Co.*, 236 U. S. 115, 124–125 (1915), was, I thought, laid to rest in *Hill* v. *Martin*, 296 U. S. 393, 403 (1935), where the Court construed "proceedings in any court of a State" comprehensively and as embracing

> "all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res judicata*. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or an-

> cillary taken with a view to making the suit or judgment effective." (Footnotes omitted.)

The Court today embarks on quite a different course and rejects not only *Hill* v. *Martin* but also a substantial body of federal court of appeals law to the effect that § 2283 bars federal court interference with executions on state court judgments. *E. g., Manufacturers Record Publishing Co.* v. *Lauer*, 268 F. 2d 187 (CA5), cert. denied, 361 U. S. 913 (1959); *Furnish* v. *Board of Medical Examiners of California*, 257 F. 2d 520 (CA9), cert. denied, 358 U. S. 882 (1958); *Norwood* v. *Parenteau*, 228 F. 2d 148 (CA8 1955), cert. denied, 351 U. S. 955 (1956).[1]

The Court also suggests that § 2283 is inapplicable here because no Connecticut court authorized the garnishment. Its view apparently is that a federal injunction would therefore not interfere with state court processes. Until now, however, it has been reasonably clear that § 2283 cannot be avoided by the simple expedient of enjoining parties instead of judges. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 9 (1940). Moreover, the Court's rationale proves too much. Contrary to the views expressed in *Hill* v. *Martin, supra,* state court ministerial officers could be enjoined at any time and for any purpose in the course of a litigation and without regard to § 2283. In addition, parties to state court litigation could be enjoined from performing any one or all of the tasks essential to the orderly progress of litigation so long as the acts in question are not carried out pursuant to court order. Depositions of parties and witnesses, interrogatories to parties, and subpoenas for witnesses are commonly pur-

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[1] Some confusion persists whether a federal court may, consistently with § 2283, enjoin the operation of a state court judgment procured by fraud. See C. Wright, Law of Federal Courts 179–181 (2d ed. 1970). That question is not presented here.

sued without resort to a judge. Are these and other functions not performed under court order now subject to attack in federal court at the option of the offended state court litigant?

Today's decision will, I fear, create confusion by making the applicability of § 2283 turn on rules that are difficult to apply. The potential for conflict between state and federal courts will increase and the price for judicial errors will be paid by litigants and courts alike. The common sense of the matter, it seems to me, is that the garnishment at issue here is part and parcel of a state court proceeding now under way. Garnishment in Connecticut may be characterized as separate from the underlying action, but it is nonetheless a proceeding and derives its legitimacy from the suit it accompanies. At the time this federal action was brought, return of process had long since been completed and the state court had acquired jurisdiction of a straightforward cause of action, including questions of the legitimacy and constitutionality of the garnishment.

It also seems to me that, quite apart from § 2283, today's holding departs from such cases as *Stefanelli* v. *Minard*, 342 U. S. 117 (1951), and *Perez* v. *Ledesma*, 401 U. S. 82 (1971), which counsel against atomizing state litigation by enjoining, for example, the introduction of illegally obtained evidence, as well as from the more general admonitions of *Younger* v. *Harris*, 401 U. S. 37 (1971); *Samuels* v. *Mackell*, 401 U. S. 66 (1971); *Boyle* v. *Landry*, 401 U. S. 77 (1971); and *Perez* v. *Ledesma*, *supra*, against improvident exercise of a federal court's equitable powers to frustrate or interfere with the operations of state courts by adjudicating federal questions that are involved in state court litigation and which can be adjudicated there. As the Court said in *Stefanelli*, if such interventions were to be permitted, "[e]very question of procedural due proc-

ess of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue." 342 U. S., at 123. Such resort, if permitted, "would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts." *Id.*, at 123–124.

Appellee Barrett invokes *Younger* and companion cases as a ground for affirming the judgment of the District Court. Of course, those cases involved federal injunctions against state criminal proceedings, but the relevant considerations, in my view, are equally applicable where state civil litigation is in progress, as is here the case.[2]

I would affirm the judgment of the court below.

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[2] I thus would affirm whether or not 42 U. S. C. § 1983 is an exception to the bar of § 2283. That question is at issue in *Mitchum* v. *Foster*, No. 70–27, now *sub judice*.

FORD MOTOR CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

No. 70–113. Argued November 18, 1971—
Decided March 29, 1972

In this divestiture action under § 7 of the Celler-Kefauver Antimerger Act, the Government challenged the acquisition by appellant, Ford, the second largest automobile manufacturer, of certain assets of Electric Autolite Co. (Autolite), an independent manufacturer of spark plugs and other automotive parts. The acquisition included the Autolite trade name, Autolite's only domestic spark plug plant, and extensive rights to its nationwide distribution organization for spark plugs and batteries. The brand used in the spark plug replacement market (*aftermarket*) has historically been the same as the original equipment (OE) brand. Autolite and other independents had furnished manufacturers with OE plugs at or below cost, seeking to recoup their losses by profitable aftermarket sales. Ford, which previously had bought all its spark plugs from independents and was the largest purchaser from that source, made the Autolite acquisition in 1961 for the purpose of participating in the aftermarket. At about that time General Motors (GM) had about 30% of the domestic spark plug market. Autolite had 15%, and Champion, the only other major independent, had 50% (which declined to 40% in 1964, and 33% in 1966). The District Court found that the industry's oligopolistic structure encouraged maintenance of the OE tie and that spark plug manufacturers, to the extent that they are not owned by auto makers, will compete more vigorously for private brand sales in the aftermarket. The court held that the acquisition of Autolite violated § 7 since its effect "may be substantially to lessen competition" in automotive spark plugs because: (1) "as both a prime candidate to manufacture and the major customer of the dominant member of the oligopoly," Ford's pre-acquisition position was a moderating influence on the independent companies, and (2) the acquisition significantly foreclosed to independent spark plug manufacturers access to the purchaser of a substantial share of the total industry output. After hearings, the court ordered the divestiture of the Autolite plant and trade name because of the industry's oligopolistic structure, which encouraged

maintenance of the OE tie. The court stressed that it was in the self-interest of the OE spark plug manufacturers to discourage private-brand sales but noted that changes in marketing methods indicated a substantial growth in the private-brand sector of the spark plug market, which, if allowed to develop without unlawful restraint, may account for 17% of the total aftermarket by 1980. Additionally, the court enjoined Ford for 10 years from manufacturing spark plugs; ordered it for five years to buy one-half its annual requirements from the divested plant under the "Autolite" name, during which time it was prohibited from using its own name on spark plugs; and for 10 years ordered it to continue its policy of selling to its dealers at prices no less than its prevailing minimum suggested jobbers' selling price. In contesting divestiture, Ford argued that under its ownership Autolite became a more effective competitor against Champion and GM than it had been as an independent and that other benefits resulted from the acquisition. *Held:*

1. The District Court correctly held that the effect of Ford's acquisition of the Autolite spark plug assets and trade name may be substantially to lessen competition in the spark plug business and thus to violate § 7 of the Celler-Kefauver Antimerger Act; and that the alleged beneficial effects of the merger did not save it from illegality under that provision, *United States* v. *Philadelphia National Bank*, 374 U. S. 321. Pp. 569–571.

2. The relief ordered by the District Court was proper. Pp. 571–578.

(a) Divestiture is necessary to restore the pre-acquisition market structure, in which Ford was the leading purchaser from independent sources, and in which a substantial segment of the market was open to competitive selling. After the divestiture, with Ford again as a purchaser of spark plugs, competitive pressures for its business will be generated and the anti-competitive consequences of its entry as a manufacturer will be eliminated. Pp. 573–575.

(b) The ancillary injunctive provisions are necessary to give the divested plant an opportunity to re-establish its competitive position and to nurture the competitive forces at work in the marketplace. Pp. 575–578.

286 F. Supp. 407, 315 F. Supp. 372, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, and MARSHALL, JJ., joined and in which (as to Part I

and part of Part II) BLACKMUN, J., joined. STEWART, J., filed an opinion concurring in the result, *post*, p. 579. BURGER, C. J., *post*, p. 582, and BLACKMUN, J., *post*, p. 595, filed opinions concurring in part and dissenting in part. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Whitney North Seymour argued the cause for appellant. With him on the briefs were *Eleanor M. Fox, Michael R. Goldenberg, George H. Hempstead III,* and *L. Homer Surbeck.*

Deputy Solicitor General Friedman argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General McLaren, Wm. Terry Bray, Irwin A. Seibel,* and *William H. McManus.*

Melvin Lashner filed a brief for Zenith Vinyl Fabrics Corp. as *amicus curiae.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a direct appeal under § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29, from a judgment of the District Court (286 F. Supp. 407, 315 F. Supp. 372), holding that Ford Motor Co. (Ford) violated § 7 of the Celler-Kefauver Antimerger Act [1] by acquiring certain assets from Electric Autolite Co. (Autolite). The assets included the Autolite trade name, Autolite's only

[1] Section 7 provides in part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. § 18.

spark plug plant in this country (located at New Fostoria, Ohio), a battery plant, and extensive rights to its nationwide distribution organization for spark plugs and batteries. The present appeal [2] is limited to that portion of the judgment relating to spark plugs and ordering Ford to divest the Autolite name and the spark plug plant. The ancillary injunctive provisions are also here for review.

I

Ford, the second-leading producer of automobiles, General Motors, and Chrysler together account for 90% of the automobile production in this country. Though Ford makes a substantial portion of its parts, prior to its acquisition of the assets of Autolite it did not make spark plugs or batteries but purchased those parts from independent companies.

The original equipment of new cars, insofar as spark plugs are concerned, is conveniently referred to as the OE tie. The replacement market is referred to as the *aftermarket*. The independents, including Autolite, furnished the auto manufacturers with OE plugs at cost or less, about six cents a plug, and they continued to sell at that price even when their costs increased threefold. The independents sought to recover their losses on OE sales by profitable sales in the *aftermarket* where the requirement of each vehicle during its lifetime is about five replacement plug sets. By custom and practice among mechanics, the *aftermarket* plug is usually the same brand as the OE plug. See generally Hansen & Smith, The Champion Case: What Is Competition?, 29 Harv. Bus. Rev. 89 (1951).

Ford was anxious to participate in this *aftermarket* and, after various efforts not relevant to the present case, concluded that its effective participation in the *after-*

[2] We noted probable jurisdiction June 7, 1971. 403 U. S. 903.

market required "an established distribution system with a recognized brand name, a full line of high volume service parts, engineering experience in replacement designs, low volume production facilities and experience, and the opportunity to capitalize on an established car population."

Ford concluded it could develop such a division of its own but decided that course would take from five to eight years and be more costly than an acquisition. To make a long story short, it acquired certain assets of Autolite in 1961.

General Motors had previously entered the spark plug manufacturing field, making the AC brand. The two other major domestic producers were independents—Autolite and Champion. When Ford acquired Autolite, whose share of the domestic spark plug market was about 15%, only one major independent was left and that was Champion, whose share of the domestic market declined from just under 50% in 1960 to just under 40% in 1964 and to about 33% in 1966. At the time of the acquisition, General Motors' market share was about 30%. There were other small manufacturers of spark plugs but they had no important share of the market.[3]

The District Court held that the acquisition of Autolite violated § 7 of the Celler-Kefauver Antimerger Act

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[3] Autolite did not sell all of its assets to Ford and changed the name of the parts of its business that it retained to Eltra Corp. which in 1962 began manufacturing spark plugs in Decatur, Alabama, under the brand name Prestolite. But in 1964 it had only 1.6% of the domestic business. Others included Atlas, sponsored by Standard Oil of New Jersey, with 1.4% of that business, and Riverside, sponsored by Montgomery Ward, with 0.6%. As further stated by the District Court:

"Most of the manufacturing for the private labels among these marketers is done by ELTRA and General Battery and Ceramic Corporation, the only producers of any stature at all after the Big Three." 286 F. Supp. 407, 435.

because its effect "may be substantially to lessen competition." [4] It gave two reasons for its decision.

First, prior to 1961 when Ford acquired Autolite it had a "pervasive impact on the aftermarket," 315 F. Supp., at 375, in that it was a moderating influence on Champion and on other companies derivatively. It explained that reason as follows:

> "An interested firm on the outside has a twofold significance. It may someday go in and set the stage for noticeable deconcentration. While it merely stays near the edge, it is a deterrent to current competitors. United States v. Penn-Olin Chemical Co., 378 U. S. 158 . . . (1964). This was Ford uniquely, as both a prime candidate to manufacture and the major customer of the dominant member of the oligopoly. Given the chance that Autolite would have been doomed to oblivion by defendant's grass-roots entry, which also would have destroyed Ford's soothing influence over replacement prices, Ford may well have been more useful as a potential than it

[4] The words were suggested by the Federal Trade Commission which told the Congress:

"Under the Sherman Act, an acquisition is unlawful if it creates a monopoly or constitutes an attempt to monopolize. Imminent monopoly may appear when one large concern acquires another, but it is unlikely to be perceived in a small acquisition by a large enterprise. As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act test against them. . . ." S. Rep. No. 1775, 81st Cong., 2d Sess., 5.

The Committee defined the words "may be" as follows:

"The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints." *Id.*, at 6.

would have been as a real producer, regardless how it began fabrication. Had Ford taken the internal-expansion route, there would have been no illegality; not, however, because the result necessarily would have been commendable, but simply because that course has not been proscribed." 286 F. Supp., at 441.

See also *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568; *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158.

Second, the District Court found that the acquisition marked "the foreclosure of Ford as a purchaser of about ten per cent of total industry output." 315 F. Supp., at 375. The District Court added:

"In short, Ford's entry into the spark plug market by means of the acquisition of the factory in Fostoria and the trade name 'Autolite' had the effect of raising the barriers to entry into that market as well as removing one of the existing restraints upon the actions of those in the business of manufacturing spark plugs.

"It will also be noted that the number of competitors in the spark plug manufacturing industry closely parallels the number of competitors in the automobile manufacturing industry and the barriers to entry into the auto industry are virtually insurmountable at present and will remain so for the foreseeable future. Ford's acquisition of the Autolite assets, particularly when viewed in the context of the original equipment (OE) tie and of GM's ownership of AC, has the result of transmitting the rigidity of the oligopolistic structure of the automobile industry to the spark plug industry, thus reducing the chances of future deconcentration of the spark plug market by forces at work within that market." *Ibid.*

See also *FTC* v. *Consolidated Foods Corp.*, 380 U. S. 592; *Brown Shoe Co.* v. *United States*, 370 U. S. 294; *United States* v. *Du Pont & Co.*, 353 U. S. 586.

We see no answer to that conclusion if the letter and spirit of the Celler-Kefauver Antimerger Act [5] are to be honored. See *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 362–363; *United States* v. *Penn-Olin Chemical Co.*, 378 U. S., at 170–171; *Brown Shoe Co.* v. *United States*, 370 U. S., at 311–323.

It is argued, however, that the acquisition had some beneficial effect in making Autolite a more vigorous and

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[5] Congressman Celler in testifying for the Celler-Kefauver bill that was the 1950 amendment to § 7 of the Clayton Act said:

"[T]he worth of the individual is the worth of the Nation; no more and no less. That which strengthens the individual bolsters the Nation; that which dwarfs the individual belittles the Nation." Hearing on H. R. 988 *et seq.* before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess., ser. 10, pp. 14–15 (1949).

Senator Kefauver spoke in the same vein:

"[I]f our democracy is going to survive in this country we must keep competition, and we must see to it that the basic materials and resources of the country are available to any little fellow who wants to go into business.

"Charts and statistics will show that every year there is more and more concentration, with more and more corporations purchasing out their competitors, so that unless this trend is halted we are going to come to a place where the basic industries and business of America are controlled by a very, very small group of a small number of corporations.

"We have already reached that point in a great many of our basic industries. The evil of that course is quite apparent. When people lose their economic freedom, they lose their political freedom.

"When the destiny of people over the land is dependent upon the decision of two or three people in a central office somewhere, then the people are going to demand that the Government do something about it.

"When it reaches that stage, it is going to result in statism of one sort or another; and whichever sort it may be, one is equally as bad as another, as I see it." *Id.*, at 12.

effective competitor against Champion and General Motors than Autolite had been as an independent. But what we said in *United States* v. *Philadelphia National Bank, supra,* disposes of that argument. A merger is not saved from illegality under § 7, we said,

> "because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid." 374 U. S., at 371.

Ford argues that the acquisition left the marketplace with a greater number of competitors. To be sure, after Autolite sold its New Fostoria plant to Ford, it constructed another in Decatur, Alabama, which by 1964 had 1.6% of the domestic business. Prior to the acquisition, however, there were only two major independent producers and only two significant purchasers of original equipment spark plugs. The acquisition thus aggravated an already oligopolistic market.

As we indicated in *Brown Shoe Co.* v. *United States,* 370 U. S., at 323–324:

> "The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition,' *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 314, which 'deprive[s] . . . rivals of a fair opportunity to compete.' H. R. Rep. No. 1191,

> 81st Cong., 1st Sess. 8. Every extended vertical arrangement by its very nature, for at least a time, denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer-party to the vertical arrangement."

Moreover, Ford made the acquisition in order to obtain a foothold in the *aftermarket*. Once established, it would have every incentive to perpetuate the OE tie and thus maintain the virtually insurmountable barriers to entry to the *aftermarket*.

II

The main controversy here has been over the nature and degree of the relief to be afforded.

During the year following the District Court's finding of a § 7 violation, the parties were unable to agree upon appropriate relief. The District Court then held nine days of hearings on the remedy and, after full consideration, concluded that divestiture and other relief were necessary.

The OE tie, it held, was in many respects the key to the solution since the propensity of the mechanic in a service station or independent garage is to select as a replacement the spark plug brand that the manufacturer installed in the car. The oligopolistic structure of the spark plug manufacturing industry encourages the continuance of that system. Neither GM nor Autolite sells private-label plugs. It is obviously in the self-interest of OE plug manufacturers to discourage private-brand sales and to encourage the OE tie. There are findings that the private-brand sector of the spark plug market will grow substantially in the next decade because mass merchandisers are entering this market in force. They not only sell all brands over the counter but also have service bays where many carry only spark plugs of their own proprietary brand. It is anticipated that by 1980

the total private brand portion of the spark plug market may then represent 17% of the total *aftermarket*. The District Court added:

> "To the extent that the spark [plug] manufacturers are not owned by the auto makers, it seems clear that they will be more favorably disposed toward private brand sales and will compete more vigorously for such sales. Also, the potential entrant continues to have the chance to sell not only the private brand customer but the auto maker as well." 315 F. Supp., at 378.

Accordingly the decree

(1) enjoined Ford for 10 years from manufacturing spark plugs,

(2) ordered Ford for five years to purchase one-half of its total annual requirement of spark plugs from the divested plant under the "Autolite" name,

(3) prohibited Ford for the same period from using its own trade names on plugs,

(4) protected New Fostoria, the town where the Autolite plant is located, by requiring Ford to continue for 10 years its policy of selling spark plugs to its dealers at prices no less than its prevailing minimum suggested jobbers' selling price,[6]

(5) protected employees of the New Fostoria plant by ordering Ford to condition its divestiture sale on the purchaser's assuming the existing wage and pension obligations and to offer employment to any employee displaced by a transfer of nonplug operations from the divested plant.[7]

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[6] The District Court found this provision necessary in order to assemble an adequate distribution system for the *aftermarket*. Without it, service stations and independent jobbers would be unable to compete with franchised car dealers for the replacement business. Ford does not challenge this provision in this Court.

[7] Ford does not challenge this ancillary portion of the District Court decree protecting the employees of the New Fostoria plant.

The relief in an antitrust case must be "effective to redress the violations" and "to restore competition." [8] *United States* v. *Du Pont & Co.*, 366 U. S. 316, 326. The District Court is clothed with "large discretion" to fit the decree to the special needs of the individual case. *International Salt Co.* v. *United States*, 332 U. S. 392, 401; *United States* v. *Du Pont & Co.*, 353 U. S., at 608; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185.

Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws. *United States* v. *Du Pont & Co.*, *supra*, at 328–335; *United States* v. *Crescent Amusement Co.*, *supra*, at 189; *Schine Chain Theatres* v. *United States*, 334 U. S. 110, 128; *United States* v. *El Paso Gas Co.*, 376 U. S. 651.

Divestiture is a start toward restoring the pre-acquisition situation. Ford once again will then stand as a large industry customer at the edge of the market with

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[8] The suggestion that antitrust "violators may not be required to do more than return the market to the *status quo ante*," *post*, at 590, is not a correct statement of the law. In *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, we sustained broad injunctions regulating motion picture licenses and clearances which were not related to the *status quo ante*. *Reynolds Metals Co.* v. *FTC*, 114 U. S. App. D. C. 2, 309 F. 2d 223 (1962), concerned the enforcement powers of the Federal Trade Commission, not the equitable powers of the District Court.

Section 4 of the Sherman Act, 15 U. S. C. § 4, and § 15 of the Clayton Act, 15 U. S. C. § 25, empower "the Attorney General, to institute proceedings in equity to prevent and restrain . . . violations" of the antitrust laws. The relief which can be afforded under these statutes is not limited to the restoration of the *status quo ante*. There is no power to turn back the clock. Rather, the relief must be directed to that which is "necessary and appropriate in the public interest *to eliminate the effects* of the acquisition offensive to the statute," *United States* v. *Du Pont & Co.*, 353 U. S. 586, 607 (emphasis added), or which will *"cure the ill effects* of the illegal conduct, and *assure the public freedom from* its continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88 (emphasis added).

a renewed interest in securing favorable terms for its substantial plug purchases. Since Ford will again be a purchaser, it is expected that the competitive pressures that existed among other spark plug producers to sell to Ford will be re-created. The divestiture should also eliminate the anticompetitive consequences in the *aftermarket* flowing from the second largest automobile manufacturer's entry through acquisition into the spark plug manufacturing business.

The divested plant is given an incentive to provide Ford with terms which will not only satisfy the 50% requirement provided for five years by the decree but which even after that period may keep at least some of Ford's ongoing purchases. The divested plant is awarded at least a foothold in the lucrative *aftermarket* and is provided an incentive to compete aggressively for that market.

As a result of the acquisition of Autolite, the structure of the spark plug industry changed drastically, as already noted. Ford, which before the acquisition was the largest purchaser of spark plugs from the independent manufacturers, became a major manufacturer. The result was to foreclose to the remaining independent spark plug manufacturers the substantial segment of the market previously open to competitive selling and to remove the significant procompetitive effects in the concentrated spark plug market that resulted from Ford's position on the edge of the market as a potential entrant.

To permit Ford to retain the Autolite plant and name and to continue manufacturing spark plugs would perpetuate the anticompetitive effects of the acquisition.[9]

[9] "[I]t would be a novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and has acquired the power which it has no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired,

The District Court rightly concluded that only divestiture would correct the condition caused by the unlawful acquisition.

A word should be said about the other injunctive provisions. They are designed to give the divested plant an opportunity to establish its competitive position. The divested company needs time so it can obtain a foothold in the industry. The relief ordered should "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance," *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88, and it necessarily must "fit the exigencies of the particular case." *International Salt Co.* v. *United States*, 332 U. S., at 401. Moreover, "it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States* v. *Du Pont & Co.*, 366 U. S., at 334.

Ford concedes that "[i]f New Fostoria is to survive, it must for the foreseeable future become and remain the OE supplier to Ford and secure and retain the benefits of such OE status in sales of replacement plugs." The ancillary measures ordered by the District Court are designed to allow Autolite to re-establish itself in the OE and replacement markets and to maintain it as a viable competitor until such time as forces already at work within the marketplace weaken the OE tie. Thus Ford is prohibited for 10 years from manufacturing its own plugs.[10] But in five years it can buy its plugs from any source and use its name on OE plugs.

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with full freedom to exercise it." *Northern Securities Co.* v. *United States*, 193 U. S. 197, 357.

[10] Ford argues that the 10-year prohibition on its manufacture of spark plugs will lessen competition because it will remove a potential competitor from the marketplace. This prohibition, however, is merely a step toward the restoration of the *status quo ante*, and is, moreover, necessary for Autolite to re-establish itself.

But prior to that time Ford cannot use or market plugs bearing the Ford trade name. In view of the importance of the OE tie, if Ford were permitted to use its own brand name during the initial five-year period, there would be a tendency to impose the oligopolistic structure of the automotive industry on the replacement parts market and the divested enterprise might well be unable to become a strong competitor. Ford argues that any prohibition against the use of its name is permissible only where the name deceives or confuses the public.[11] But this is not an unfair competition case. The temporary ban on the use of the Ford name is designed to restore the pre-acquisition competitive structure of the market.

The requirement that, for five years, Ford purchase at

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[11] Ford also argues that the right to its own trade name is a constitutionally protected property right (cf. *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *United States* v. *Tropiano*, 418 F. 2d 1069, 1076 (CA2 1969)), and that the remedial provision of § 15 of the Clayton Act should not be construed to limit the use of this right. Even on that assumption, we could not accept the conclusion advanced by Ford.

Even constitutionally protected property rights such as patents may not be used as levers for obtaining objectives proscribed by the antitrust laws. *E. g., Besser Mfg. Co.* v. *United States*, 343 U. S. 444, 448–449; *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488. Here, the use by Ford of its trade name would perpetuate the OE tie and would have the prohibited effect of hindering the re-entry of Autolite to the spark plug market as a viable competitor.

"The trade mark may become a detrimental weapon if it is used to serve a harmful or injurious purpose. If it becomes a tool to circumvent free enterprise and unbridled competition, public policy dictates that the rights enjoyed by its ownership be kept within their proper bounds. If a trade mark may be the legal basis for allocating world markets, fixing of prices, restricting competition, the unfailing device has been found to destroy every vestige of inhibition set up by the Sherman Act." *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 316 (ND Ohio 1949), aff'd, 341 U. S. 593 (1951).

least half of its spark plug requirements from the divested company under the Autolite label is to give the divested enterprise an assured customer while it struggles to be re-established as an effective, independent competitor.

It is suggested, however, that "the District Court's orders assured that Ford could not begin to have brand name success in the replacement market for at least 10 to 13 years." *Post,* at 591. This conclusion distorts the effect of the District Court decree and the nature of the spark plug industry. Ford's own studies indicate that it would take five to eight years for it to develop a spark plug division internally. A major portion of this period would be devoted to the development of a viable position in the aftermarket. The five-year prohibition on the use of its own name and the 10-year limitation on its own manufacturing mesh neatly to allow Ford to establish itself in the *aftermarket* prior to becoming a manufacturer while, at the same time, giving Autolite the opportunity to re-establish itself by providing a market for its production. Thus, the District Court's decree delays for only two to five years the date on which Ford may become a manufacturer with an established share of the *aftermarket.* Given the normal five-to-eight-year lead time on entry through internal expansion, the District Court's decree does not significantly lessen Ford's moderating influence as a potential entrant on the edge of the market. Moreover, in light of the interim benefits this ancillary relief will have on the re-establishment of Autolite as a viable competitor and of Ford as a major purchaser, we cannot agree with the characterization of the relief as "harshly restrictive," *post,* at 595, or the assertion that the decree, in any practical and significant sense, "prohibit[s] Ford from entering the market through internal expansion." *Post,* at 592.

Antitrust relief should unfetter a market from anticompetitive conduct and "pry open to competition a

market that has been closed by defendants' illegal restraints." *International Salt Co.* v. *United States*, 332 U. S., at 401. The temporary elimination of Ford as a manufacturer of spark plugs lowers a major barrier to entry to this industry. See C. Kaysen & D. Turner, Antitrust Policy—An Economic and Legal Analysis 116 (1959). Forces now at work in the marketplace may bring about a deconcentrated market structure and may weaken the onerous OE tie. The District Court concluded that the forces of competition must be nurtured to correct for Ford's illegal acquisition. We view its decree as a means to that end.[12]

The thorough and thoughtful way the District Court considered all aspects of this case, including the nature of the relief, is commendable. The drafting of such a decree involves predictions and assumptions concerning future economic and business events. Both public and private interests are involved; and we conclude that the District Court with a single eye to the requirements of § 7 and the violation that was clearly established made a reasonable judgment on the means needed to restore and encourage the competition adversely affected by the acquisition.

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

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[12] The District Court decree thus implements the congressional judgment in favor of atomized markets reflected in the Celler-Kefauver Antimerger Act:

"But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision." *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 344.

MR. JUSTICE STEWART, concurring in the result.

The spark plug industry as it stood prior to Ford's acquisition of Autolite was hardly characterized by vigorous competition. For 25 years, the industry had consisted of AC, owned by and supplying original equipment (OE) plugs to General Motors; Champion, independent and supplying Ford; Autolite, independent and supplying Chrysler; and a number of small producers who had no OE sales and only a minuscule share of the aftermarket.[1] The habit among mechanics of installing replacement plugs carrying the same brand as the automobile's original plugs, reinforced by the unwillingness of service stations to stock more than two or three brands,[2] made possible the "OE tie," which rendered any large-scale entry into the aftermarket virtually impossible without first obtaining a large OE customer. Moreover, price competition was minimal, both in the OE market (where any reduction in the six-cent price would immediately be matched by rivals), and in the aftermarket (where spark plugs accounted for such a small percentage of the normal tuneup charge that price differentials did not have a significant impact upon consumer choice).

The District Court found that the acquisition of Autolite's spark plug assets by Ford further lessened competition in the industry in two ways: it foreclosed Ford as a potential purchaser of spark plugs from independent producers, and it eliminated what the District Court found to have been Ford's "moderating effect" upon Champion's pricing policies in the aftermarket. These

[1] Both Champion and Autolite supplied OE plugs to American Motors, which in 1961 had roughly 5% of the domestic automobile market.

[2] According to a 1966 survey, only 11% of all metropolitan area service stations stocked any brand of spark plug other than Champion, AC, or Autolite, and only 30% stocked all three of the leading brands.

findings standing alone might provide a basis for concluding that the acquisition violated § 7, but, as THE CHIEF JUSTICE demonstrates in his dissenting opinion, *post*, at 591–592, the remedy ordered will not restore the pre-acquisition market forces upon which the District Court focused. For, under the court's injunctions, Ford will be neither a potential market entrant, nor a potential purchaser of half its OE requirements from producers other than Autolite, for a substantial period of time after the divestiture takes place.

In my judgment, both the finding of a § 7 violation and the remedy ordered may be better rationalized in terms of probable future trends in the spark plug market, visible at the time of the acquisition. The District Court observed that "a court cannot shut its eyes to contemporary or predictable factors conducive to change in the competitive structure." 286 F. Supp. 407, 442. This was a proper inquiry because we have held that § 7 "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future." *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 362.[3]

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[3] Ford argues that the acquisition allowed Autolite to compete more effectively against the two larger brands, Champion and AC. Since this argument is addressed to the effect of the acquisition upon *competition*, the Court obviously provides no answer to the argument when it quotes *Philadelphia National Bank* for the proposition that arguments *unrelated* to the merger's effect upon *competition* are irrelevant in a § 7 case. But Ford's arguments that Autolite was a more effective competitor after the acquisition rests principally on the fact that Autolite's market share increased after 1961 while Champion's decreased. This development, however, can be attributed for the most part to the fact that Autolite now provides OE plugs to Ford, rather than to the smaller Chrysler. Autolite's increased market share, therefore, is more likely attributable to the OE tie than to any increase in its competitive vigor.

The District Court found that the growth of service-centers operated by mass merchandisers carrying private label brands might eventually loosen the OE tie and the tight oligopoly in the spark plug market that it had fostered. Had Ford entered the market through internal expansion, either Champion or Autolite would have been left without an OE entry, but would nevertheless have owned an established brand name with an existing distribution system, together with a large production capacity. Even the threat of being so stranded, not to mention its realization, would have given both Champion and Autolite an incentive to compete as suppliers to private label sellers, as these sellers began to represent a significant share of the market, and to undermine the OE tie. Ford's acquisition of Autolite did more than foreclose it as a potential OE customer, or eliminate its "moderating effect" upon Champion's pricing policies: it eliminated one of the only two independent producers with a sufficient share of the aftermarket to give it a chance to compete effectively without an OE tie. Thus, the acquisition had the probable effect of indefinitely postponing the day when existing market forces could produce a measurable deconcentration in the market.

While the District Court did not justify the divestiture in precisely these terms, I think its prediction of future trends in the spark plug industry is an adequate basis to support the remedy ordered. THE CHIEF JUSTICE's opinion, *post*, at 591–592, is correct in its assertion that the ancillary injunctions are anticompetitive in the short run, and that the District Court took extraordinary measures to mother the divested producer for the next decade. But I cannot say that these injunctions are not reasonably calculated to establish the new Autolite producer as a viable firm and thus to restore the pre-acquisition market structure, insofar as it is now possible to do so. A divestiture decree

without ancillary injunctions would not automatically restore the *status quo ante*, as THE CHIEF JUSTICE's opinion seems to assume. The Electric Autolite Company, from which Ford acquired the assets in question here, will not be recreated by the divestiture, and it is reasonable to assume that a new owner of the Autolite trade name and the New Fostoria plant will require a period of time to become as effective a competitor as was Electric Autolite prior to the acquisition.

Though the economics of the market are such that the divestiture cannot be assured of success, it does at least have a chance of bringing increased competition to the spark plug industry. And while divestiture remedies in § 7 cases have not enjoyed spectacular success in the past, remedies short of divestiture have been uniformly unsuccessful in meeting the goals of the Act. See Elzinga, The Antimerger Law: Pyrrhic Victories, 12 J. Law & Econ. 43 (1969).

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

In addition to requiring divestiture of Autolite, the District Court made ancillary injunctive provisions that go far beyond any that have been cited to the Court. Ford is forbidden to manufacture spark plugs for 10 years; Ford is ordered to purchase one-half of its total annual requirement of spark plugs from the divested company under the "Autolite" name, and Ford is forbidden for the same period to use its own trade name on any spark plugs. These provisions are directed to prevent Ford from making an independent entry into the spark plug market and, in effect, to require it to subsidize Autolite for a period of time. Despite the Draconian quality of this restriction on Ford, I can find no justification in the District Court's findings for this

remedy. I dissent from the broad sweep of the District Court's remedial decree. I would remand for further consideration of the remedial aspects of this case.

An understanding of the District Court's findings as to the spark plug market shows three reasons why it was in error in requiring Ford to support Autolite. First, the court did *not* find that the weakness of an independent Autolite's competitive position resulted from Ford's acquisition. Rather, a reading of its findings makes apparent that the precariousness of Autolite's expected post-divestment position results from pre-existing forces in the market. Therefore, the drastic measures employed to strengthen Autolite's position at Ford's expense cannot be justified as a remedy for any wrong done by Ford. Second, the remedy will perpetuate for a time the very evils upon which the District Court based a finding of an antitrust violation. Third, the court's own findings indicate that the remedy is not likely to secure Autolite's competitive position beyond the termination of the restrictions. Therefore, there is no assurance that the judicial remedy will have the desired impact on long-run competition in the spark plug market.

The Court makes two critical errors in order to avoid the effect of this reasoning. It rejects the factfinding by the District Court in order to uphold its remedial order; and it repeats that court's error by discussing the assistance necessary to restore Autolite to the *status quo ante* without ever delineating that prior state of affairs or indicating how Ford, by acquiring Autolite and holding it for a number of years, had undermined its ability to reassume its former independent competitive position.

The District Court made extensive findings on the nature of the spark plug market. Some of these findings appear in the Court's opinion, but some factors that

seem crucial to me are either omitted or not adequately set forth. Therefore I will sketch these findings at some risk of repetition.

Beyond doubt, the spark plug market has been overwhelmingly dominated by three manufacturers for a long period: AC, owned by General Motors, which had about 30% of the market in 1961; Champion, which had supplied Ford since 1910 and had approximately 50% of the market in 1961; and Autolite, which had supplied Chrysler since 1941 and had 15% of the market in 1961. Together these three companies had over 95% of the total market in 1961.

The reason for the continued domination of the market by the three big plug manufacturers is the pervasive feature of the plug market known as the "OE (original equipment) tie." This denominates the phenomenon that mechanics who replace spark plugs in a car engine have tended, almost exclusively, to use the brand of plug installed by the auto builder as original equipment. Though not required by spark plug technology, mechanics have followed this practice because of a strong desire to avoid any chance of injuring an engine by putting a mismatched plug into it. Further, because plugs are low-profit items, those who install them tend to carry an inventory of a small number of brands. Most carry only two and some carry three brands, and they choose the brands installed by the big auto manufacturers as original equipment. Thus, it takes a position as supplier to a large auto maker to gain recognition in the spark plug replacement market. The Government conceded in the District Court, for instance, that American Motors, with 5% of the auto market, would not be able to create market acceptance for an independent brand of plug by installing it as original equipment in its cars.

Because of the competitive importance of having their plugs installed as original equipment by one of the three

auto companies, plug manufacturers have over a long period been willing to sell OE plugs for initial installation by auto manufacturers at a price below their production cost. The longstanding price for OE plugs, about 6 cents, is now approximately one-third of the cost of producing these plugs. Such below-cost selling is profitable for the plug companies because of the foothold it gives them in competing for the normal five or six sets of replacement plugs necessary in the lifespan of an automobile. This pricing policy has been partially responsible for the semipermanent relations between the plug manufacturers and the auto manufacturers: it is only those plug companies that profit from the OE tie over the long run that can afford this below-cost sale to the auto companies.

The strength of the OE tie is demonstrated by the inability of well-known auto supply manufacturers to gain a significant share of the spark plug market in the absence of an OE tie. As the District Court found, no company without the OE tie

> "ever surpassed the 2% level. Several have come and gone. Firestone Tire and Rubber Company merchandised 'Firestone' replacements for 35 years before it gave up in 1964. Although it owned some 800 accessory stores and successfully wholesaled other items to more than 50,000 shops and filling stations, it could not surmount the patent discrimination against brands not blessed with Detroit's approbation. Goodyear Tire and Rubber Company quit in only three years. Globe Union, a fabricator which had barely 1% of the nation's shipments, withdrew in 1960." 286 F. Supp. 407, 434–435.

Two small manufacturers survive, producing plugs for private-label brands. Thus "Atlas" plugs, sponsored by

the Standard Oil companies, has 1.4% of the replacement market; "Prestolite" and Sears, Roebuck's "Allstate" each have 1.2%; and Montgomery Ward's "Riverside" label has 0.6% of the replacement market.

An independent entry into the plug market by Ford, with the expected substitution of its own plugs as original equipment in its cars, would have necessarily deprived one of the two significant independent plug producers of its OE status. The District Court found that, because of the importance of the OE tie, the plug producer deprived of this support would most likely have lost any significant position in the market.[1] Autolite, with only 15% of the market before the acquisition, would certainly have lost any significant position in the market if an independent entry by Ford had led Chrysler to shift its patronage from Autolite to Champion. The District Court asserted that a Champion without OE status would have had some chance of maintaining a significant market position because of its size, although it gave no reason for thinking Champion's size immunized it from dependence on OE status. Before 1961, Champion had just under 50% of the market. As a result of Champion's move to Chrysler in 1961, its position in the market dropped to 33% by 1966. The District Court found no basis for predicting which of the two big independents would have won such a competition for continued OE status.

Thus, an independent entry by Ford would not likely have increased the number of significant competitors in the spark plug market. Rather, it would simply have substituted Ford for one of the two significant independent manufacturers. The result of this expectation

[1] Of course, the decline would take a number of years, since it would be spread over the life of the cars on the road bearing the producer's plugs as original equipment—probably five to eight years.

is that the District Court did not base its finding of illegality on the ground typically present when a potential entrant enters an oligopolistic market by acquisition rather than internal expansion, *i. e.*, that such a move has deprived the market of the pro-competitive effect of an increase in the number of competitors. Here an independent entry would not have increased the number of competitors but simply would have exchanged one competitor for another. In noting this paradoxical fact, the District Court concluded that "Ford may well have been more useful as a potential than it would have been as a real producer, regardless how it began fabrication." [2] 286 F. Supp., at 441.

Not finding that Ford's entry by acquisition had deprived the spark plug market of any pro-competitive effect of an independent entry, the District Court relied on two other grounds for finding a violation of the antitrust laws. First, it concluded that as a potential entrant on the edge of the market which was also a major purchaser in the market, Ford exercised a "moderating" influence on the market; the second basis for determining the acquisition illegal was the finding that the acqui-

[2] MR. JUSTICE STEWART, concurring in the result, relies on factual assumptions that seem to me directly contrary to findings made by the District Court. While that court found future developments might arise in the plug market that would enable an independent Autolite without OE status to survive, it also found that an independent entry by Ford in 1960, or even as of the date of the projected divestiture, would have left Autolite doomed because the market would not yet be ready to offer it an independent niche. By slighting these findings, MR. JUSTICE STEWART is able to avoid the question whether Ford should have to bear the burden of maintaining Autolite's life until a time when market changes might support it when it is clear that an earlier independent entry by Ford would have left it moribund. He further overlooks the problems discussed below as to the unlikelihood of Autolite's success, its fixed-production needs versus the small size of the market free of the OE tie.

sition "foreclosed" other companies from competing for the business of supplying Ford with spark plugs.

With respect to Autolite itself, the District Court made several relevant findings. First, it found that Autolite is a fixed-production plant. In other words, it can be profitable only turning out approximately the number of plugs it now manufactures. It could not, for instance, reduce its production by half and sell that at a profit. Second, it made extensive findings with respect to Autolite's distribution system:

> "Ford received six regional offices, personnel and a list of Electric Autolite's warehousers and jobbers. All of these have been and still are at liberty to deal with anyone they wish. Each old direct account had to be visited individually and, if it consented, be re-signed by defendant [Ford]. Within a few months, 52 did enter into new ignition contracts. However, 50 of these for the previous year had also been . . . [distributors of other Ford products]. By mid-1966, direct accounts totaled 156, of which 104 in 1960 had been pledged to neither Ford nor Autolite. The same bloc of 50 had been committed to both. The net increase traceable with any semblance of accuracy to the acquisition is two first-layer middlemen . . . ." 286 F. Supp., at 422.

As to difficulties that a divested Autolite might have in establishing an independent distribution system, the District Court mentioned only one:[3] if Ford were to offer its own plugs to its car dealers at a fairly low price, one which independent jobbers could not meet, Autolite

[3] The District Court made no mention of whether a divested Autolite would have the six regional offices and personnel that it had in 1960. Given the District Court's solicitude for Autolite's health, I can only assume that it expected Autolite to be sent out with whatever it had brought in.

would have difficulty independently establishing its distribution system. The jobbers would be less interested in handling Autolite's line since the Ford dealers would not want Autolite at the jobbers' price and, with this demand cut out, the jobbers would be less interested in pushing Autolite generally.

There is another set of relevant facts found by the District Court. The District Judge found that "there is a rising wind of new forces in the spark plug market which may profoundly change it." 315 F. Supp. 372, 377. On the basis of the testimony of an executive of one of the producers of plugs for private labels, the court found that the private-brand sector would grow during the next 10 years. This highly speculative observation of the District Court was based on a finding that the mass merchandisers are beginning to enter the plug marketing field in force. Not only do the mass merchandisers market private-brand plugs over the counter, but they are also building service bays. And in these bays many carry only their own proprietary brand of spark plugs. This witness predicted that the mass merchandisers would increase their share of the aftermarket from 4.4% to 10% by 1980. He further predicted that oil companies would enter the replacement market, resulting in a total of 17% of the replacement market being supplied by private-label plugs by 1980. The court concluded that these forces "may well lead to [the market's] eventual deconcentration by increasing the number of potential customers for a new entrant into the plug manufacturing business and reducing the need for original equipment identification." 315 F. Supp., at 378.

In its separate opinion on remedies, the District Court correctly stated the relevant law; the purpose, and limit of antitrust remedies, is to

> "free these forces [within the market] from the unlawful restraint imposed upon them so that they

may run their natural course." 315 F. Supp., at 377.

The violators may not be required to do more than return the market to the *status quo ante*. See *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 152–153 (1948); *Reynolds Metals Co.* v. *FTC*, 114 U. S. App. D. C. 2, 309 F. 2d 223 (1962) (Burger, J.). Applying this general provision to the instant situation, the District Court correctly stated:

> "The court wishes to note here that although it finds that divestiture is the only effective remedy, it does not agree with the Government that the remedy should be affirmatively designed to 'break the OE tie.' The remedy is designed to correct the violations of Section 7 found by the court. The OE tie, as such, does not violate Section 7." 315 F. Supp., at 378.

The District Court then concluded that, in addition to divestiture of the Autolite plant and trade name, certain injunctive provisions were required "to give [Autolite] an opportunity to establish its competitive position." *Ibid.* It therefore ordered that Ford be prohibited from manufacturing spark plugs for a period of 10 years. It further ordered that for a period of five years Ford would be *required* to purchase one-half of its total annual needs of spark plugs from Autolite, bearing the Autolite label. For this five-year period Ford was also ordered not to use or market a spark plug under a trade name owned by or licensed to it. The effect of these orders was twofold. They assured Autolite of a purchaser for a large part of its production for five years. And they prevented Ford from immediately entering the competition for a share of the aftermarket with a plug under its own name; it could not even label a plug under its own name for five years and could not manufacture its own plug for 10 years.

Given the findings of the court that even with the status of supplier of original equipment (with the company's own brand name on plugs) to a major auto manufacturer it would take a new entrant into the spark plug market five to eight years to establish a position for its brand in the replacement market, the District Court's orders assured that Ford could not begin to have brand-name success in the replacement market for at least 10 to 13 years.[4]

In my view these drastic remedial provisions are not warranted by the court's findings as to the grounds on which Ford's acquisition violated the antitrust laws. Further, in light of the District Court's own factfindings, these remedies will have short run anticompetitive impact and they give no assurance that they will succeed in allowing Autolite to establish its competitive position.

The remedial provisions are unrelated to restoring the *status quo ante* with respect to the two violations found by the District Court, the ending of Ford's status as a potential entrant with a moderating influence on the market and the foreclosure of a significant part of the plug market. Indeed, the remedies may well be anticompetitive in both respects. First, the District Court's order actually undercuts the moderating influence of Ford's position on the edge of the market. It is the

[4] The majority opinion errs in its evaluation, *ante*, at 577, of the effect of the restrictions on Ford's ability to establish itself in the aftermarket. The District Court opinion makes clear that gaining a position in the replacement market takes five to eight years after the brand of plugs is first installed as original equipment: 18 months to three years before the first cars need plug replacements plus several annual car populations requiring this brand before service centers would be motivated to stock it. Thus, the prohibition against Ford's using its own name for five years delays the beginning of an independent Ford entry and results in assuring that Ford could not gain a position in the aftermarket for 10 to 13 years after the effective date of the divestiture.

possibility that a company on the sidelines will enter a market through internal expansion that has a moderating influence on the market. By prohibiting Ford from entering the market through internal expansion, therefore, the remedy order wipes out, for the duration of the restriction, the pro-competitive influence Ford had on the market prior to its acquisition of Autolite. Second, the Court's order does not fully undo the foreclosure effect of the acquisition. Divestment alone would return the parties to the *status quo ante*. Ford would then be free to deal with Autolite or another plug producer or to enter the market through internal expansion. Yet the Court has ordered Ford to buy at least half its requirements from Autolite for five years. Thus, the order itself forecloses part of Ford's needs from the forces of competition.

The above problems might be minor if the District Court's remedy were justifiable in terms of returning Autolite to the *status quo ante* by overcoming some harm to its ability to compete accomplished by Ford's acquisition. But on this issue the District Court opinion and the majority of this Court are confused. Although the District Court asserted that Autolite needed the aid of its injunctive remedies to establish its competitive position, the court made no findings in its remedy opinion as to the source of Autolite's competitive weakness. Therefore it never reached the issue whether the source of weakness had anything to do with the violations attributed to Ford. Instead, the court's opinion proceeded from the recognition of competitive problems immediately to the prescription of a remedy.

In fact, a fair reading of the findings of the District Court shows that the acquisition did not injure Autolite's competitive position. Autolite's OE status was continued and its share of the aftermarket was increased from 12.5% to 19%. Thus, its trademark is at least as strong now as when Ford acquired the company. Nor

did the acquisition and holding of Autolite injure its distribution system. The District Court found that Autolite did not own a distribution system. It merely had short-term contracts with jobbers who distributed its plugs to those who install them in cars or sell them to the public. Almost all of these jobbers had concurrent distribution relations with Ford. In fact, between 1961 and 1966 Ford *tripled* the number of jobbers handling Autolite plugs. From the opinion below, it appears that Ford has done nothing that will prevent an independent Autolite from seeking to maintain these distribution channels. The only possible finding of injury to be squeezed out of the acquisition relates to the fact that Autolite has been shorn of its status as OE supplier of Chrysler. But this is inconclusive. Autolite had nothing more in its position as OE supplier to Chrysler than it would if Ford voluntarily chose to use Autolite plugs after the divestment: a relationship based on short-term contracts the auto manufacturer could refuse to renew at any time.

The findings of the District Court indicate that Autolite's precarious position did not result from its acquisition by Ford. Prior to the acquisition both Champion and Autolite were in a continually precarious position in that their continued large share of the market was totally dependent on their positions as OE suppliers to auto manufacturers. The very factor that assured that they faced no serious competition in the short run also assured that in the long run their own position was dependent on their relationship with a large auto manufacturer. Thus, the threat to Autolite posed by a simple divestiture is the same threat it had lived with between 1941 and 1961 as an independent entity: it might be left without any OE supply relationship with a major auto manufacturer, and therefore its market position based on this relationship might decline drastically.

Today's opinion errs when it states, *ante*, at 571, that the District Judge found the OE tie the "key to the solution" of this problem. Although the court indeed found this tie a pervasive factor in the market, it also found that the phenomenon was not created by Ford and that it did not constitute a § 7 violation. Therefore the Court errs in justifying the ancillary remedies as necessary to overcome the OE tie. Even if such a remedy might overcome the OE tie, which I question, there is no justification for burdening *Ford* with the restrictive order.

Further, the only conclusion to be drawn from the trial findings is that the remedy is unlikely to result in a secure market position for Autolite at the end of the restricted period. Once again it will be dependent for its survival on whether it can maintain an OE supply status. The District Court's suggestion that Autolite can find a niche supplying private-brand labels is unpersuasive. It cannot be predicted with any certainty that these sales outlets will grow to the extent predicted by one person in that line of the business. Further, even if they do, this is no assurance of Autolite's survival. There are already several companies in the business of producing plugs for private labels. Autolite will have to compete with them. The results will not be helpful. One possibility is that Autolite would completely monopolize the private-brand market to the extent of about 17% of the replacement market. This is as uncompetitive as it is unlikely. The more reasonable likelihood is that Autolite might be able to gain a position producing, for instance, 5% of the replacement market plugs. But this would be useless because the District Court's findings make clear that Autolite's fixed-production plant cannot supply such a small share of the market at a profit.

In the final analysis it appears to me that the District Court, seeing the immediate precariousness of Autolite's

position as a divested entity, designed remedies to support Autolite without contemplating whether it was equitable to restrict Ford's freedom of action for these purposes or whether there was any real chance of Autolite's eventual survival. I fear that this is a situation where the form of preserving competition has taken precedence over an understanding of the realities of the particular market. Therefore I dissent from today's affirmance of the District Court's harshly restrictive remedial provisions.[5]

MR. JUSTICE BLACKMUN, concurring in part and dissenting in part.

I concur in Part I of the Court's opinion and in that portion of Part II that approves divestiture as part of the remedy. I cannot agree, however, that prohibiting Ford from using its own name or its trade name on any spark plugs for five years and enjoining it entirely from manufacturing plugs for 10 years is just, equitable, or necessary. Instead, the stringency of those remedial provisions strikes me as confiscatory and punitive. The Court's opinion, *ante*, at 566, recognizes that Ford could develop its own spark plug division internally and place itself in the same position General Motors has occupied for so long, but that this would take from five to eight years. The restraint on Ford's entering the spark plug area is thus for a period longer than it would take Ford to achieve a position in the market through internal development. And to deny it the use of its own name is to deny it a property right that has little to do with this litigation.

[5] This case illustrates the unsoundness of the direct appeal permitted in cases of this kind under 15 U. S. C. § 29. In a factually complicated case like this, we would be immeasurably aided by the screening process provided by a Court of Appeals review. Limited expediting of such cases, under the discretion of this Court, would satisfy all needs justifying direct review in this Court.

UNITED STATES *v.* TOPCO ASSOCIATES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 70–82. Argued November 16, 1971—Decided March 29, 1972

The United States brought this injunction action charging a violation of § 1 of the Sherman Act by appellee, Topco, a cooperative association of about 25 small and medium-sized independent regional supermarket chains operating in 33 States. As its members' purchasing agent appellee procures more than 1,000 different items, most of which have brand names owned by Topco. The members' combined retail sales in 1967 were $2.3 billion, exceeded by only three national grocery chains. A member's average market share in its area is about 6% and its competitive position is frequently as strong as that of any other chain. The members own equal amounts of Topco's common stock (the voting stock), choose its directors, and completely control the association's operations. Topco's bylaws establish an "exclusive" category of territorial licenses, under which most members' licenses are issued and the two other membership categories have proved to be *de facto* exclusive. Since no member under this system may sell Topco-brand products outside the territory in which it is licensed, expansion into another member's territory is in practice permitted only with the other member's consent, and since a member in effect has a veto power over admission of a new member, members can control actual or potential competition in the territorial areas in which they are concerned. Topco members are prohibited from selling any products supplied by the association at wholesale, whether trademarked or not, without securing special permission, which is not granted without the consent of other interested licensees (usually retailers) and then the member must agree to restrict Topco product sales to a specific area and under certain conditions. The Government charged that Topco's scheme of dividing markets violates the Sherman Act because it operates to prohibit competition in Topco-brand products among retail grocery chains, and also challenged Topco's restrictions on wholesaling. Topco contended that it needs territorial divisions to maintain its private-label program and to enable it to compete with the larger chains; that the association could not exist if the territorial divisions were not exclusive; and that the restrictions on competition in Topco-brand sales enable members to meet larger chain competition.

The District Court, agreeing with Topco, upheld the restrictive practices as reasonable and pro-competitive. *Held:* The Topco scheme of allocating territories to minimize competition at the retail level is a horizontal restraint constituting a *per se* violation of § 1 of the Sherman Act, and the District Court erred in applying a rule of reason to the restrictive practices here involved. *United States* v. *Sealy, Inc.*, 388 U. S. 350. Topco's limitations upon reselling at wholesale are for the same reason *per se* invalid under § 1. Pp. 606–612.

319 F. Supp. 1031, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and WHITE, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 612. BURGER, C. J., filed a dissenting opinion, *post*, p. 613. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Howard E. Shapiro argued the cause for the United States. With him on the briefs were *Solicitor General Griswold* and *Deputy Assistant Attorney General Comegys*.

Victor E. Grimm argued the cause for appellee. With him on the brief were *John T. Loughlin* and *William R. Carney*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The United States brought this action for injunctive relief against alleged violation by Topco Associates, Inc. (Topco), of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. Jurisdiction was grounded in § 4 of the Act, 15 U. S. C. § 4. Following a trial on the merits, the United States District Court for the Northern District of Illinois entered judgment for Topco, 319 F. Supp. 1031, and the United States appealed directly to this Court pursuant to § 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. We noted probable jurisdiction, 402 U. S. 905 (1971), and we now reverse the judgment of the District Court.

I

Topco is a cooperative association of approximately 25 small and medium-sized regional supermarket chains that operate stores in some 33 States.[1] Each of the member chains operates independently; there is no pooling of earnings, profits, capital, management, or advertising resources. No grocery business is conducted under the Topco name. Its basic function is to serve as a purchasing agent for its members.[2] In this capacity, it procures and distributes to the members more than 1,000 different food and related nonfood items, most of which are distributed under brand names owned by Topco. The association does not itself own any manufacturing, processing, or warehousing facilities, and the items that it procures for members are usually shipped directly from the packer or manufacturer to the members. Payment is made either to Topco or directly to the manufacturer at a cost that is virtually the same for the members as for Topco itself.

All of the stock in Topco is owned by the members, with the common stock, the only stock having voting rights, being equally distributed. The board of directors, which controls the operation of the association, is drawn from the members and is normally composed of high-ranking executive officers of member chains. It is the board that elects the association's officers and ap-

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[1] Topco, which is referred to at times in this opinion as the "association," is actually composed of 23 chains of supermarket retailers and two retailer-owned cooperative wholesalers.

[2] In addition to purchasing various items for its members, Topco performs other related functions: *e. g.*, it insures that there is adequate quality control on the products that it purchases; it assists members in developing specifications on certain types of products (*e. g.*, equipment and supplies); and it also aids the members in purchasing goods through other sources.

points committee members, and it is from the board that the principal executive officers of Topco must be drawn. Restrictions on the alienation of stock and the procedure for selecting all important officials of the association from within the ranks of its members give the members complete and unfettered control over the operations of the association.

Topco was founded in the 1940's by a group of small, local grocery chains, independently owned and operated, that desired to cooperate to obtain high quality merchandise under private labels in order to compete more effectively with larger national and regional chains.[3] With a line of canned, dairy, and other products, the

[3] The founding members of Topco were having difficulty competing with larger chains. This difficulty was attributable in some degree to the fact that the larger chains were capable of developing their own private-label programs.

Private-label products differ from other brand-name products in that they are sold at a limited number of easily ascertainable stores. A&P, for example, was a pioneer in developing a series of products that were sold under an A&P label and that were only available in A&P stores. It is obvious that by using private-label products, a chain can achieve significant cost economies in purchasing, transportation, warehousing, promotion, and advertising. These economies may afford the chain opportunities for offering private-label products at lower prices than other brand-name products. This, in turn, provides many advantages of which some of the more important are: a store can offer national-brand products at the same price as other stores, while simultaneously offering a desirable, lower priced alternative; or, if the profit margin is sufficiently high on private-brand goods, national-brand products may be sold at reduced price. Other advantages include: enabling a chain to bargain more favorably with national-brand manufacturers by creating a broader supply base of manufacturers, thereby decreasing dependence on a few, large national-brand manufacturers; enabling a chain to create a "price-mix" whereby prices on special items can be lowered to attract customers while profits are maintained on other items; and creation of general goodwill by offering lower priced, higher quality goods.

association began. It added frozen foods in 1950, fresh produce in 1958, more general merchandise equipment and supplies in 1960, and a branded bacon and carcass beef selection program in 1966. By 1964, Topco's members had combined retail sales of more than $2 billion; by 1967, their sales totaled more than $2.3 billion, a figure exceeded by only three national grocery chains.[4]

Members of the association vary in the degree of market share that they possess in their respective areas. The range is from 1.5% to 16%, with the average being approximately 6%. While it is difficult to compare these figures with the market shares of larger regional and national chains because of the absence in the record of accurate statistics for these chains, there is much evidence in the record that Topco members are frequently in as strong a competitive position in their respective areas as any other chain. The strength of this competitive position is due, in some measure, to the success of Topco-brand products. Although only 10% of the total goods sold by Topco members bear the association's brand names, the profit on these goods is substantial and their very existence has improved the competitive potential of Topco members with respect to other large and powerful chains.

It is apparent that from meager beginnings approximately a quarter of a century ago, Topco has developed into a purchasing association wholly owned and operated by member chains, which possess much economic muscle, individually as well as cooperatively.

II

Section 1 of the Sherman Act provides, in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of

[4] The three largest chains are A&P, Safeway, and Kroger.

> trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

The United States charged that, beginning at least as early as 1960 and continuing up to the time that the complaint was filed, Topco had combined and conspired with its members to violate § 1 [5] in two respects. First, the Government alleged that there existed:

> "a continuing agreement, understanding and concert of action among the co-conspirator member firms acting through Topco, the substantial terms of which have been and are that each co-conspirator member firm will sell Topco-controlled brands only within the marketing territory allocated to it, and will refrain from selling Topco-controlled brands outside such marketing territory."

The division of marketing territories to which the complaint refers consists of a number of practices by the association.

Article IX, § 2, of the Topco bylaws establishes three categories of territorial licenses that members may secure from the association:

> "(a) *Exclusive*—An exclusive territory is one in which the member is licensed to sell all products bearing specified trademarks of the Association, to the exclusion of all other persons.
>
> "(b) *Non-exclusive*—A non-exclusive territory is one in which a member is licensed to sell all products bearing specified trademarks of the Association, but not to the exclusion of others who may also be licensed to sell products bearing the same trademarks of the Association in the same territory.
>
> "(c) *Coextensive*—A coextensive territory is one

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[5] Topco was named in the complaint as the sole defendant, but the complaint clearly charged that its members, while not defendants, were coconspirators in Topco's violation of the Sherman Act.

> in which two (2) or more members are licensed to sell all products bearing specified trademarks of the Association to the exclusion of all other persons. . . ."

When applying for membership, a chain must designate the type of license that it desires. Membership must first be approved by the board of directors, and thereafter by an affirmative vote of 75% of the association's members. If, however, the member whose operations are closest to those of the applicant, or any member whose operations are located within 100 miles of the applicant, votes against approval, an affirmative vote of 85% of the members is required for approval. Bylaws, Art. I, § 5. Because, as indicated by the record, members cooperate in accommodating each other's wishes, the procedure for approval provides, in essence, that members have a veto of sorts over actual or potential competition in the territorial areas in which they are concerned.

Following approval, each new member signs an agreement with Topco designating the territory in which that member may sell Topco-brand products. No member may sell these products outside the territory in which it is licensed. Most licenses are exclusive, and even those denominated "coextensive" or "non-exclusive" prove to be *de facto* exclusive. Exclusive territorial areas are often allocated to members who do no actual business in those areas on the theory that they may wish to expand at some indefinite future time and that expansion would likely be in the direction of the allocated territory. When combined with each member's veto power over new members, provisions for exclusivity work effectively to insulate members from competition in Topco-brand goods. Should a member violate its license agreement and sell in areas other than those in which it is licensed, its membership can be terminated under Art. IV, §§ 2 (a) and 2 (b) of the

bylaws. Once a territory is classified as exclusive, either formally or *de facto*, it is extremely unlikely that the classification will ever be changed. See Bylaws, Art. IX.

The Government maintains that this scheme of dividing markets violates the Sherman Act because it operates to prohibit competition in Topco-brand products among grocery chains engaged in retail operations. The Government also makes a subsidiary challenge to Topco's practices regarding licensing members to sell at wholesale. Under the bylaws, members are not permitted to sell any products supplied by the association at wholesale, whether trademarked or not, without first applying for and receiving special permission from the association to do so.[6] Before permission is granted, other licensees (usually retailers), whose interests may potentially be affected by wholesale operations, are consulted as to their wishes in the matter. If permission is obtained, the member must agree to restrict

[6] Article IX, § 8, of the bylaws provides, in relevant part:

"Unless a member's membership and licensing agreement provides that such member may sell at wholesale, a member may not wholesale products supplied by the Association. If a membership and licensing agreement permits a member to sell at wholesale, such member shall control the resale of products bearing trademarks of the Association so that such sales are confined to the territories granted to the member, and the method of selling shall conform in all respects with the Association's policies."

Shortly before trial, Topco amended this bylaw with an addition that permitted any member to wholesale in the exclusive territories in which it retailed. But the restriction remained the same in all other cases.

It is apparent that this bylaw on its face applies whether or not the products sold are trademarked by Topco. Despite the fact that Topco's general manager testified at trial that, in practice, the restriction is confined to Topco-branded products, the District Court found that the bylaw is applied as written. We find nothing clearly erroneous in this finding. Assuming, *arguendo*, however, that the restriction is confined to products trademarked by Topco, the result in this case would not change.

the sale of Topco products to a specific geographic area and to sell under any conditions imposed by the association. Permission to wholesale has often been sought by members, only to be denied by the association. The Government contends that this amounts not only to a territorial restriction violative of the Sherman Act, but also to a restriction on customers that in itself is violative of the Act.[7]

From the inception of this lawsuit, Topco accepted as true most of the Government's allegations regarding territorial divisions and restrictions on wholesaling, although it differed greatly with the Government on the conclusions, both factual and legal, to be drawn from these facts.

Topco's answer to the complaint is illustrative of its posture in the District Court and before this Court:

> "Private label merchandising is a way of economic life in the food retailing industry, and exclusivity is the essence of a private label program; without exclusivity, a private label would not be private. Each national and large regional chain has its own exclusive private label products in addition to the nationally advertised brands which all chains sell. Each such chain relies upon the exclusivity of its own private label line to differentiate its private

[7] When the Government first raised this point in the District Court, Topco objected on the ground that it was at variance with the charge in the complaint. The District Court apparently agreed with Topco that the complaint did not cover customer limitations, but permitted the Government to pursue this line on the basis that if the limitations were proved, the complaint could later be amended. App. 141. Topco acquiesced in this procedure, and both sides dealt with customer limitations in examining witnesses. The District Court made specific findings and conclusions with respect to the totality of the restraints on wholesaling. In light of these facts, the additional fact that the complaint was never formally amended should not bar our consideration of the issue.

> label products from those of its competitors and to attract and retain the repeat business and loyalty of consumers. Smaller retail grocery stores and chains are unable to compete effectively with the national and large regional chains without also offering their own exclusive private label products.
>
> . . . . .
>
> "The only feasible method by which Topco can procure private label products and assure the exclusivity thereof is through trademark licenses specifying the territory in which each member may sell such trademarked products." Answer, App. 11.

Topco essentially maintains that it needs territorial divisions to compete with larger chains; that the association could not exist if the territorial divisions were anything but exclusive; and that by restricting competition in the sale of Topco-brand goods, the association actually increases competition by enabling its members to compete successfully with larger regional and national chains.

The District Court, considering all these things relevant to its decision, agreed with Topco. It recognized that the panoply of restraints that Topco imposed on its members worked to prevent competition in Topco-brand products,[8] but concluded that

> "[w]hatever anti-competitive effect these practices may have on competition in the sale of Topco pri-

[8] The District Court recognized that "[t]he government has introduced evidence indicating that some applications by Topco members to expand into territories assigned to other members have been denied," 319 F. Supp. 1031, 1042, but concluded that these decisions by Topco did not have an appreciable influence on the decision of members as to whether or not to expand. Topco expands on this conclusion in its brief by asserting that "the evidence is uncontradicted that a member has never failed to build a new store because it was unable to obtain a license." Brief for Appellee 18 n. 18. The problem with the conclusion of the District Court and the

vate label brands is far outweighed by the increased ability of Topco members to compete both with the national chains and other supermarkets operating in their respective territories." 319 F. Supp. 1031, 1043 (1970).

The court held that Topco's practices were procompetitive and, therefore, consistent with the purposes of the antitrust laws. But we conclude that the District Court used an improper analysis in reaching its result.

III

On its face, § 1 of the Sherman Act appears to bar any combination of entrepreneurs so long as it is "in restraint of trade." Theoretically, all manufacturers, distributors, merchants, sellers, and buyers could be considered as potential competitors of each other. Were § 1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it. *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918) (Brandeis, J.). The history underlying the formulation of the antitrust laws led this Court to conclude, however, that Congress did not intend to prohibit all contracts, nor even all contracts that might in some insignificant degree or attenuated sense restrain trade or competition. In lieu of the narrowest possible reading of § 1, the Court adopted a "rule of reason" analysis for determining

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assertion by Topco is that they are wholly inconsistent with the notion that territorial divisions are crucial to the existence of Topco, as urged by the association and found by the District Court. From the filing of its answer to the argument before this Court, Topco has maintained that without a guarantee of an exclusive territory, prospective licensees would not join Topco and present licensees would leave the association. It is difficult to understand how Topco can make this argument and simultaneously urge that territorial restrictions are an unimportant factor in the decision of a member on whether to expand its business.

whether most business combinations or contracts violate the prohibitions of the Sherman Act. *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911). An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. *Chicago Board of Trade* v. *United States, supra,* at 238.

While the Court has utilized the "rule of reason" in evaluating the legality of most restraints alleged to be violative of the Sherman Act, it has also developed the doctrine that certain business relationships are *per se* violations of the Act without regard to a consideration of their reasonableness. In *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 5 (1958), Mr. Justice Black explained the appropriateness of, and the need for, *per se* rules:

> "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken."

It is only after considerable experience with certain business relationships that courts classify them as *per se*

violations of the Sherman Act. See generally Van Cise, The Future of Per Se in Antitrust Law, 50 Va. L. Rev. 1165 (1964). One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a "horizontal" restraint, in contradistinction to combinations of persons at different levels of the market structure, *e. g.*, manufacturers and distributors, which are termed "vertical" restraints. This Court has reiterated time and time again that "[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition." *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963). Such limitations are *per se* violations of the Sherman Act. See *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211 (1899), aff'g 85 F. 271 (CA6 1898) (Taft, J.); *United States* v. *National Lead Co.*, 332 U. S. 319 (1947); *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951); *Northern Pacific R. Co.* v. *United States*, *supra*; *Citizen Publishing Co.* v. *United States*, 394 U. S. 131 (1969); *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967); *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 390 (1967) (STEWART, J., concurring in part and dissenting in part); *Serta Associates, Inc.* v. *United States*, 393 U. S. 534 (1969), aff'g 296 F. Supp. 1121, 1128 (ND Ill. 1968).

We think that it is clear that the restraint in this case is a horizontal one, and, therefore, a *per se* violation of § 1. The District Court failed to make any determination as to whether there were *per se* horizontal territorial restraints in this case and simply applied a rule of reason in reaching its conclusions that the restraints were not illegal. See, *e. g.*, Comment, Horizontal Territorial Restraints and the Per Se Rule, 28 Wash. & Lee L. Rev. 457, 469 (1971). In so doing, the District Court erred.

United States v. *Sealy, Inc., supra,* is, in fact, on all fours with this case. Sealy licensed manufacturers of mattresses and bedding to make and sell products using the Sealy trademark. Like Topco, Sealy was a corporation owned almost entirely by its licensees, who elected the Board of Directors and controlled the business. Just as in this case, Sealy agreed with the licensees not to license other manufacturers or sellers to sell Sealy-brand products in a designated territory in exchange for the promise of the licensee who sold in that territory not to expand its sales beyond the area demarcated by Sealy. The Court held that this was a horizontal territorial restraint, which was *per se* violative of the Sherman Act.[9]

Whether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us. The fact is that courts are of limited utility in examining difficult economic problems.[10] Our inability to weigh, in any mean-

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[9] It is true that in *Sealy* the Court dealt with price fixing as well as territorial restrictions. To the extent that *Sealy* casts doubt on whether horizontal territorial limitations, unaccompanied by price fixing, are *per se* violations of the Sherman Act, we remove that doubt today.

[10] There has been much recent commentary on the wisdom of *per se* rules. See, *e. g.,* Comment, Horizontal Territorial Restraints and the Per Se Rule, 28 Wash. & Lee L. Rev. 457 (1971); Averill, Sealy, Schwinn and Sherman One: An Analysis and Prognosis, 15 N. Y. L. F. 39 (1969); Note, Selected Antitrust Problems of the Franchisor: Exclusive Arrangements, Territorial Restrictions, and Franchise Termination, 22 U. Fla. L. Rev. 260, 286 (1969); Sadd, Antitrust Symposium: Territorial and Customer Restrictions After *Sealy* and *Schwinn,* 38 U. Cin. L. Rev. 249, 252–253 (1969); Bork, The Rule of Reason and the Per Se Concept, pt. 1, Price Fixing and Market Division, 74 Yale L. J. 775 (1965).

Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this

ingful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.

In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition. *E. g., United States* v. *General Motors Corp.*, 384 U. S. 127, 146–147 (1966); *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942); *Fashion Originators' Guild* v. *FTC*, 312 U. S. 457 (1941).

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy. Cf. *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 371 (1963).

The District Court determined that by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains. But, the fallacy in this is that Topco has no authority under the Sherman Act to determine the

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area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.

respective values of competition in various sectors of the economy. On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products. Without territorial restrictions, Topco members may indeed "[cut] each other's throats." Cf. *White Motor Co., supra,* at 278 (Clark, J., dissenting). But, we have never found this possibility sufficient to warrant condoning horizontal restraints of trade.

The Court has previously noted with respect to price fixing, another *per se* violation of the Sherman Act, that:

> "The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed." *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 397 (1927).

A similar observation can be made with regard to territorial limitations. *White Motor Co., supra,* at 265 n. 2 (BRENNAN, J., concurring).

There have been tremendous departures from the notion of a free-enterprise system as it was originally conceived in this country. These departures have been the product of congressional action and the will of the people. If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to

bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

Just as the territorial restrictions on retailing Topco-brand products must fall, so must the territorial restrictions on wholesaling. The considerations are the same, and the Sherman Act requires identical results.

We also strike down Topco's other restrictions on the right of its members to wholesale goods. These restrictions amount to regulation of the customers to whom members of Topco may sell Topco-brand goods. Like territorial restrictions, limitations on customers are intended to limit intra-brand competition and to promote inter-brand competition. For the reasons previously discussed, the arena in which Topco members compete must be left to their unfettered choice absent a contrary congressional determination. *United States* v. *General Motors Corp., supra;* cf. *United States* v. *Arnold, Schwinn & Co., supra; United States* v. *Masonite Corp., supra; United States* v. *Trenton Potteries, supra.* See also, *White Motor Co., supra,* at 281–283 (Clark, J., dissenting).

We reverse the judgment of the District Court and remand the case for entry of an appropriate decree.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, concurring in the result.

The conclusion the Court reaches has its anomalous aspects, for surely, as the District Court's findings make clear, today's decision in the Government's favor will tend to stultify Topco members' competition with the great and larger chains. The bigs, therefore, should find it easier to get bigger and, as a consequence, reality

seems at odds with the public interest. The *per se* rule, however, now appears to be so firmly established by the Court that, at this late date, I could not oppose it. Relief, if any is to be forthcoming, apparently must be by way of legislation.

MR. CHIEF JUSTICE BURGER, dissenting.

This case does not involve restraints on interbrand competition or an allocation of markets by an association with monopoly or near-monopoly control of the sources of supply of one or more varieties of staple goods. Rather, we have here an agreement among several small grocery chains to join in a cooperative endeavor that, in my view, has an unquestionably lawful principal purpose; in pursuit of that purpose they have mutually agreed to certain minimal ancillary restraints that are fully reasonable in view of the principal purpose and that have never before today been held by this Court to be *per se* violations of the Sherman Act.

In joining in this cooperative endeavor, these small chains did not agree to the restraints here at issue in order to make it possible for them to exploit an already established line of products through noncompetitive pricing. There was no such thing as a Topco line of products until this cooperative was formed. The restraints to which the cooperative's members have agreed deal only with the marketing of the products in the Topco line, and the only function of those restraints is to permit each member chain to establish, within its own geographical area and through its own local advertising and marketing efforts, a local consumer awareness of the trademarked family of products as that member's "private label" line. The goal sought was the enhancement of the individual members' abilities to compete, albeit to a modest degree, with the large national chains which had been successfully marketing private-label lines for

several years. The sole reason for a cooperative endeavor was to make economically feasible such things as quality control, large quantity purchases at bulk prices, the development of attractively printed labels, and the ability to offer a number of different lines of trademarked products. All these things, of course, are feasible for the large national chains operating individually, but they are beyond the reach of the small operators proceeding alone.[1]

After a careful review of the economic considerations bearing upon this case, the District Court determined that "the relief which the government here seeks would not increase competition in Topco private label brands"; on the contrary, such relief "would substantially diminish competition in the supermarket field." 319 F. Supp. 1031, 1043. This Court has not today determined, on the basis of an examination of the underlying economic realities, that the District Court's conclusions are incorrect. Rather, the majority holds that the District Court had no business examining Topco's practices under the "rule of reason"; it should not have sought to determine whether Topco's practices did in fact restrain trade or commerce within the meaning of § 1 of the Sherman Act; it should have found no more than that those practices involve a "horizontal division of markets" and are, by that very fact, *per se* violations of the Act.

I do not believe that our prior decisions justify the result reached by the majority. Nor do I believe that a new *per se* rule should be established in disposing of this case, for the judicial convenience and ready pre-

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[1] The District Court's findings of fact include the following:

"33. A competitively effective private label program to be independently undertaken by a single retailer or chain would require an annual sales volume of $250 million or more and in order to achieve optimum efficiency, the volume required would probably have to be twice that amount." 319 F. Supp. 1031, 1036.

dictability that are made possible by *per se* rules are not such overriding considerations in antitrust law as to justify their promulgation without careful prior consideration of the relevant economic realities in the light of the basic policy and goals of the Sherman Act.

I

I deal first with the cases upon which the majority relies in stating that "[t]his Court has reiterated time and time again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' *White Motor Co.* v. *United States,* 372 U. S. 253, 263 (1963)." *White Motor,* of course, laid down no *per se* rule; nor were any horizontal territorial limitations involved in that case. Indeed, it was in *White Motor* that this Court reversed the District Court's holding that vertically imposed territorial limitations were *per se* violations, explaining that "[w]e need to know more than we do about the actual impact of these arrangements on competition to decide whether they . . . should be classified as *per se* violations of the Sherman Act." 372 U. S., at 263. The statement from the *White Motor* opinion quoted by the majority today was made without citation of authority and was apparently intended primarily to make clear that the facts then before the Court were not to be confused with horizontally imposed territorial limitations. To treat dictum in that case as controlling here would, of course, be unjustified.

Having quoted this dictum from *White Motor,* the Court then cites eight cases for the proposition that horizontal territorial limitations are *per se* violations of the Sherman Act. One of these cases, *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1 (1958), dealt exclusively with a prohibited tying arrangement and is improperly cited as a case concerned with a division of

markets.[2] Of the remaining seven cases, four involved an aggregation of trade restraints that included price-fixing agreements. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951); *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967);[3] *Serta Associates, Inc.* v. *United States*, 393 U. S. 534 (1969), aff'g 296 F. Supp. 1121 (ND Ill. 1968). Price fixing is, of course, not a factor in the instant case.

Another of the cases relied upon by the Court, *United States* v. *National Lead Co.*, 332 U. S. 319 (1947), involved a world-wide arrangement[4] for dividing territo-

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[2] There is dictum in the case to the effect that *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (CA6 1898), aff'd, 175 U. S. 211 (1899), established a "division of markets" as unlawful in and of itself. 356 U. S., at 5. As I will show, however, *Addyston Pipe* established no such thing; it was primarily a price-fixing case.

[3] I cannot agree with the Court's description of *Sealy* as being "on all fours with this case." *Ante*, at 609. *Sealy* does support the proposition that the restraints on the Topco licensees are horizontally imposed. Beyond that, however, *Sealy* is hardly controlling here. The territorial restrictions in *Sealy* were found by this Court to be so intimately a part of an unlawful price-fixing and policing scheme that the two arrangements fell together:

"[T]his unlawful resale price-fixing activity refutes appellee's claim that the territorial restraints were mere incidents of a lawful program of trademark licensing. Cf. *Timken Roller Bearing Co.* v. *United States*, [341 U. S. 593 (1951)]. The territorial restraints were a part of the unlawful price-fixing and policing." 388 U. S., at 356.

[4] In summarizing its findings, the District Court made the following statements:

"When the story is seen as a whole, there is no blinking the fact that there is no free commerce in titanium. Every pound of it is trammelled by privately imposed regulation. The channels of this commerce have not been formed by the winds and currents of competition. They are, in large measure, artificial canals privately constructed. . . .

. . . . . .

". . . No titanium pigments enter the United States except with the consent of NL [defendant National Lead]. No foreign titanium

ries, pooling patents, and exchanging technological information. The arrangement was found illegal by the District Court without any reliance on a *per se* rule;[5] this Court, in affirming, was concerned almost exclusively with the remedies ordered by the District Court and made no attempt to declare a *per se* rule to govern the merits of the case.

In still another case on which the majority relies, *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), the District Court had, indeed, held that the agreements between the manufacturer and certain of its distributors, providing the latter with exclusive territories, were horizontal in nature and that they were, as such, *per se* violations of the Act. 237 F. Supp. 323, 342–343. Since no appeal was taken from this part of the District Court's order,[6] that issue was not before this Court in its review of the case. Indeed, in dealing with the issues that were before it, this Court followed an approach markedly different from that of the District Court. First, in reviewing the case here, the Court made it clear that it was proceeding under the "rule of

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pigments move in interstate commerce except with like approval. No titanium pigment produced by NL may leave the ports of the United States for points outside the Western Hemisphere." 63 F. Supp. 513, 521–522.

[5] The District Court clearly decided the case under the "rule of reason." It found that there was "a combination and conspiracy in restraint of trade; and the restraint is *unreasonable*. As such it is outlawed by Section 1 of the Sherman Act." 63 F. Supp., at 523 (emphasis added). The court rejected the argument made by the defense that the basic agreement on which the arrangement was founded was permissible under "the doctrine which validates covenants in restraint of trade when reasonably ancillary to a lawful principal purpose . . . . [T]he world-wide territorial allocation was *unreasonable in scope when measured against the business actualities.*" *Id.*, at 524 (emphasis added).

[6] "The appellees did not appeal from the findings and order invalidating [territorial] restraints on resale by distributors . . . ." 388 U. S., at 368.

reason," and not by *per se* rule;[7] second, the Court saw the issues presented as involving vertical, not horizontal, restraints.[8] It can hardly be contended, therefore, that this Court's decision in *Schwinn* is controlling precedent for the application in the instant case of a *per se* rule that prohibits horizontal restraints without regard to their market effects.

Finally, there remains the eighth of the cases relied upon by the Court—actually, the first in its list of "authorities" for the purported *per se* rule. Circuit Judge (later Chief Justice) Taft's opinion for the court in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (CA6 1898), aff'd, 175 U. S. 211 (1899), has generally been recognized—and properly so—as a fully authoritative exposition of antitrust law. But neither he, nor this Court in affirming, made any pretense of establishing a *per se* rule against all agreements involving horizontal territorial limitations. The defendants in that case were manufacturers and vendors of cast-iron pipe who had "entered into a combination to raise the prices for pipe" throughout a number of States "constituting considerably more than three-quarters of the territory of the United States, and significantly called . . . 'pay territory.'" 85 F., at 291. The associated defendants in

[7] "The Government does not contend that a *per se* violation of the Sherman Act is presented by the practices which are involved in this appeal . . . . Accordingly, we are remitted to an appraisal of the market impact of these practices.

". . . [W]e must look to the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not 'reasonable' in the special sense in which § 1 of the Sherman Act must be read for purposes of this type of inquiry." 388 U. S., at 373–374.

[8] "We are here confronted with challenged vertical restrictions as to territory and dealers. . . . These are not horizontal restraints, in which the actors are distributors with or without the manufacturer's participation." 388 U. S., at 372.

combination controlled two-thirds of the manufactured output of such pipe in this "pay territory"; certain cities ("reserved" cities) within the territory were assigned to particular individual defendants who sold pipe in those cities at prices fixed by the association, the other defendants submitting fictitious bids and the selling defendants paying a fixed "bonus" to the association for each sale. Outside the "reserved" cities, all sales by the defendants to customers in the "pay territory" were, again, at prices determined by the association and were allocated to the association member who offered, in a secret auction, to pay the largest "bonus" to the association itself. The effect was, of course, that the buying public lost all benefit of competitive pricing. Although the case has frequently—and quite properly—been cited as a horizontal allocation-of-markets case, the sole purpose of the secret customer allocations was to enable the members of the association to fix prices charged to the public at noncompetitive levels. Judge Taft rejected the defendants' argument that the prices actually charged were "reasonable"; he held that it was sufficient for a finding of a Sherman Act violation that the combination and agreement of the defendants gave them such monopoly power that they, rather than market forces, fixed the prices of all cast-iron pipe in three-fourths of the Nation's territory. The case unquestionably laid important groundwork for the subsequent establishment of the *per se* rule against price fixing. It did not, however, establish that a horizontal division of markets is, without more, a *per se* violation of the Sherman Act.

II

The foregoing analysis of the cases relied upon by the majority indicates to me that the Court is not merely following prior holdings; on the contrary, it is estab-

lishing a new *per se* rule. In the face of the District Court's well supported findings that the effects of such a rule in this case will be adverse to the public welfare,[9] the Court lays down that rule without regard to the impact that the condemned practices may have on competition. In doing so, the Court virtually invites Congress to undertake to determine that impact. *Ante*, at 611–612. I question whether the Court is fulfilling the role assigned to it under the statute when it declines to make this determination; in any event, if the Court is unwilling on this record to assess the economic impact, it surely should not proceed to make a new rule to govern the economic activity. *White Motor Co.* v. *United States*, 372 U. S., at 263.

When one of his versions of the proposed Act was before the Senate for consideration in 1890, Senator Sherman, in a lengthy, and obviously carefully prepared, address to that body, said that the bill sought

> "only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer. It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at

[9] Among the facts found by the District Court are the following: private-label brand merchandising, which is beyond the reach of the small chains acting independently and which by definition depends upon local exclusivity, permits the merchandiser to offer the public "lower consumer prices on products of high quality" and "to bargain more favorably with national brand manufacturers"; such merchandising fosters "the establishment of a broader supply base of manufacturers, thereby decreasing dependence upon a relatively few, large national brand manufacturers"; it also enables "[s]maller manufacturers, the most common source of private label products, who are generally unable to develop national brand name recognition for their products, [to] benefit . . . by the assurance of a substantial market for their products . . . ." 319 F. Supp., at 1035.

by this bill, and not the lawful and useful combination.

. . . . .

"I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law . . . ." 21 Cong. Rec. 2457, 2460.

In "carry[ing] out the meaning of the law" by making its "determin[ations] in each particular case," this Court early concluded that it was Congress' intent that a "rule of reason" be applied in making such case-by-case determinations. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 60 (1911). And that rule of reason was to be applied in light of the Act's policy to protect the "public interests." *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179 (1911). The *per se* rules that have been developed are similarly directed to the protection of the public welfare; they are complementary to, and in no way inconsistent with, the rule of reason. The principal advantages that flow from their use are, first, that enforcement and predictability are enhanced and, second, that unnecessary judicial investigation is avoided in those cases where practices falling within the scope of such rules are found. As the Court explained in *Northern Pacific R. Co.* v. *United States*, *supra*, at 5,

"[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

In formulating a new *per se* rule today, the Court does not tell us what "pernicious effect on competition" the practices here outlawed are perceived to have; nor does it attempt to show that those practices "lack . . . any redeeming virtue." Rather, it emphasizes only the importance of predictability, asserting that "courts are of limited utility in examining difficult economic problems" and have not yet been left free by Congress to "ramble through the wilds of economic theory in order to maintain a flexible approach." [10]

With all respect, I believe that there are two basic fallacies in the Court's approach here. First, while I would not characterize our role under the Sherman Act as one of "rambl[ing] through the wilds," it is indeed one that requires our "examin[ation of] difficult economic problems." We can undoubtedly ease our task, but we should not abdicate that role by formulation of *per se* rules with no justification other than the enhancement of predictability and the reduction of judicial investigation. Second, from the general proposition that *per se* rules play a necessary role in antitrust law, it does not follow that the particular *per se* rule promulgated today is an appropriate one. Although it might well be desirable in a proper case for this Court to formulate a *per se* rule dealing with horizontal territorial limitations, it would not necessarily be appropriate for such a rule to amount to a blanket prohibition against all such limitations. More specifically, it is far from clear to me why such a rule should cover those division-of-market agreements that involve no price fixing and which are con-

[10] It seems ironical to me that in another antitrust case decided today, *Ford Motor Co.* v. *United States*, *ante*, p. 562, the Court, in contrast to its handling of the instant case, goes out of its way to commend another District Court for its treatment of a problem involving "predictions and assumptions concerning future economic and business events." *Id.*, at 578.

cerned only with trademarked products that are not in a monopoly or near-monopoly position with respect to competing brands. The instant case presents such an agreement; I would not decide it upon the basis of a *per se* rule.[11]

The District Court specifically found that the horizontal restraints involved here tend positively to promote competition in the supermarket field and to produce lower costs for the consumer. The Court seems implicitly to accept this determination, but says that the Sherman Act does not give Topco the authority to determine for itself "whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products." *Ante*, at 611. But the majority overlooks a further specific determination of the District Court, namely, that the invalidation of the restraints here at issue "would not increase competition in Topco private label brands." 319 F. Supp., at 1043. Indeed, the District Court seemed to believe that it would, on the contrary, lead to the likely demise of those brands in time. And the evidence before the District Court would appear to justify that conclusion.

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[11] The national chains market their own private-label products, and these products are available nowhere else than in the stores of those chains. The stores of any one chain, of course, do not engage in price competition with each other with respect to their chain's private-label brands, and no serious suggestion could be made that the Sherman Act requires otherwise. I fail to see any difference whatsoever in the economic effect of the Topco arrangement for the marketing of Topco-brand products and the methods used by the national chains in marketing their private-label brands. True, the Topco arrangement involves a "combination," while each of the national chains is a single integrated corporation. The controlling consideration, however, should be that in neither case is the policy of the Sherman Act offended, for the practices in both cases work to the benefit, and not to the detriment, of the consuming public.

There is no national demand for Topco brands, nor has there ever been any national advertising of those brands. It would be impracticable for Topco, with its limited financial resources, to convert itself into a national brand distributor in competition with distributors of existing national brands. Furthermore, without the right to grant exclusive licenses, it could not attract and hold new members as replacements for those of its present members who, following the pattern of the past, eventually grow sufficiently in size to be able to leave the cooperative organization and develop their own individual private-label brands. Moreover, Topco's present members, once today's decision has had its full impact over the course of time, will have no more reason to promote Topco products through local advertising and merchandising efforts than they will have such reason to promote any other generally available brands.

The issues presented by the antitrust cases reaching this Court are rarely simple to resolve under the rule of reason; they do indeed frequently require us to make difficult economic determinations. We should not for that reason alone, however, be overly zealous in formulating new *per se* rules, for an excess of zeal in that regard is both contrary to the policy of the Sherman Act and detrimental to the welfare of consumers generally. Indeed, the economic effect of the new rule laid down by the Court today seems clear: unless Congress intervenes, grocery staples marketed under private-label brands with their lower consumer prices will soon be available only to those who patronize the large national chains.

Syllabus

ALEXANDER *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 70-5026. Argued December 6-7, 1971—
Decided April 3, 1972

Petitioner, a Negro, attacks his rape conviction in Lafayette Parish, which was affirmed by the Louisiana Supreme Court, contending that the grand jury selection procedures followed in his case were invidiously discriminatory against Negroes and, because of a statutory exemption provision, against women. The jury commissioners (all white) sent out questionnaires (including a space for racial designation) to those on a list compiled from nonracial sources. Of the 7,000-odd returns, 1,015 (14%) were from Negroes, though Negroes constituted 21% of the parish population presumptively eligible for grand jury service. By means of two culling-out procedures, when racial identifications that the commissioners had attached to the forms were plainly visible, the pool was reduced to 400, of whom 27 (7%) were Negro, from which group the 20-man grand jury venires were drawn. Petitioner's venire included one Negro (5%), and the grand jury that indicted him had none. There was no evidence of conscious racial selection and one commissioner testified that race was no consideration. *Held:*

1. Petitioner made out a prima facie case of invidious racial discrimination in the selection of the grand jury that indicted him—not only on a statistical basis but by a showing that the selection procedures were not racially neutral—and the State, which did not adequately explain the disproportionately low number of Negroes throughout the selection process, did not meet the burden of rebutting the presumption of unconstitutionality in the procedures used. Cf. *Avery* v. *Georgia*, 345 U. S. 559; *Whitus* v. *Georgia*, 385 U. S. 545. Pp. 628-632.

2. Petitioner's contentions regarding discrimination against women in the selection of grand jurors are not reached. Pp. 633-634.

255 La. 941, 233 So. 2d 891, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined, and in Part I of which DOUGLAS, J., joined. DOUGLAS, J., filed a concurring opinion, *post*, p. 634. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Charles Stephen Ralston argued the cause for petitioner. With him on the brief were *Jack Greenberg, James M. Nabrit III, Margrett Ford,* and *Charles Finley.*

Bertrand DeBlanc argued the cause for respondent. With him on the brief were *Jack P. F. Gremillion,* Attorney General of Louisiana, *Harry Howard,* Assistant Attorney General, and *Charles R. Sonnier.*

Birch Bayh filed a brief for the National Federation of Business and Professional Women's Clubs, Inc., as *amicus curiae* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

After a jury trial in the District Court for the Fifteenth Judicial District of Lafayette Parish, Louisiana, petitioner, a Negro, was convicted of rape and sentenced to life imprisonment. His conviction was affirmed on appeal by the Louisiana Supreme Court,[1] and this Court granted certiorari.[2] Prior to trial, petitioner had moved to quash the indictment because (1) Negro citizens were included on the grand jury list and venire in only token numbers, and (2) female citizens were systematically excluded from the grand jury list, venire, and impaneled grand jury.[3] Petitioner therefore argued that the indictment against him was invalid because it was returned by a grand jury impaneled from a venire made up con-

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[1] 255 La. 941, 233 So. 2d 891 (1970). Petitioner was indicted for aggravated rape, and a 12-member jury unanimously returned a verdict of "Guilty without Capital Punishment."

[2] 401 U. S. 936 (1971).

[3] Petitioner does not here challenge the composition of the petit jury that convicted him. The principles that apply to the systematic exclusion of potential jurors on the ground of race are essentially the same for grand juries and for petit juries, however. *Pierre* v. *Louisiana,* 306 U. S. 354, 358 (1939). See generally *Neal* v. *Delaware,* 103 U. S. 370 (1881).

trary to the requirements of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Petitioner's motions were denied.

According to 1960 U. S. census figures admitted into evidence below, Lafayette Parish contained 44,986 persons over 21 years of age and therefore presumptively eligible for grand jury service;[4] of this total, 9,473 persons (21.06%) were Negro.[5] At the hearing on petitioner's motions to quash the indictment, the evidence revealed that the Lafayette Parish jury commission consisted of five members, all of whom were white, who had been appointed by the court. The commission compiled a list of names from various sources (telephone directory, city directory, voter registration rolls, lists prepared by the school board, and by the jury commissioners themselves) and sent questionnaires to the persons on this list to determine those qualified for grand jury service. The questionnaire included a space to indicate the race of the recipient. Through this process, 7,374 questionnaires were returned, 1,015 of which (13.76%) were from Negroes,[6] and the jury commissioners attached to each

[4] The general qualifications for jurors set by Louisiana law are that a person must be a citizen of the United States and of Louisiana who has resided in the parish for at least a year prior to jury service, be at least 21 years old, be able to read, write, and speak the English language, "[n]ot be under interdiction, or incapable of serving as a juror because of a mental or physical infirmity," and "[n]ot be under indictment for a felony, nor have been convicted of a felony for which he has not been pardoned." La. Code Crim. Proc., Art. 401 (1967).

[5] Testimony at the hearing on the motion to quash the indictment also revealed that there were 40,896 registered voters in the parish. Of this total, 17,803 were white males, and 16,483 were white females; 3,573 were Negro males, and 3,037 were Negro females. App. 38.

[6] One hundred and eighty-nine questionnaires had no racial designation. App. 15.

questionnaire an information card designating, among other things, the race of the person, and a white slip indicating simply the name and address of the person. The commissioners then culled out about 5,000 questionnaires, ostensibly on the ground that these persons were not qualified for grand jury service or were exempted under state law. The remaining 2,000 sets of papers were placed on a table, and the papers of 400 persons were selected, purportedly at random, and placed in a box from which the grand jury panels of 20 for Lafayette Parish were drawn. Twenty-seven of the persons thus selected were Negro (6.75%).[7] On petitioner's grand jury venire, one of the 20 persons drawn was Negro (5%), but none of the 12 persons on the grand jury that indicted him, drawn from this 20, was Negro.

I

For over 90 years, it has been established that a criminal conviction of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which Negroes were excluded by reason of their race. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); *Neal* v. *Delaware*, 103 U. S. 370 (1881). Although a defendant has no right to demand that members of his race be included on the grand jury that indicts him, *Virginia* v. *Rives*, 100 U. S. 313 (1880), he is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the admin-

[7] There are some inconsistencies in the record as to the total number of Negroes in this group. The State introduced a certification by the clerk of the court stating that there were 25 Negroes and four persons with no race shown. App. 15. A count of the actual list of jurors, however, shows 27 Negroes and five persons with no race shown. App. 16–24.

istration of justice.[8] *Ex parte Virginia*, 100 U. S. 339 (1880); *Gibson* v. *Mississippi*, 162 U. S. 565 (1896). Cf. *Hernandez* v. *Texas*, 347 U. S. 475 (1954). It is only the application of these settled principles that is at issue here.

This is not a case where it is claimed that there have been no Negroes called for service within the last 30 years, *Patton* v. *Mississippi*, 332 U. S. 463, 464 (1947); only one Negro chosen within the last 40 years, *Pierre* v. *Louisiana*, 306 U. S. 354, 359 (1939); or no Negroes selected "within the memory of witnesses who had lived [in the area] all their lives," *Norris* v. *Alabama*, 294 U. S. 587, 591 (1935). Rather, petitioner argues that, in his case, there has been a consistent process of progressive and disproportionate reduction of the number of Negroes eligible to serve on the grand jury at each stage of the selection process until ultimately an all-white grand jury was selected to indict him.

In Lafayette Parish, 21% of the population was Negro and 21 or over, therefore presumptively eligible for grand jury service. Use of questionnaires by the jury commissioners created a pool of possible grand jurors which was 14% Negro, a reduction by one-third of possible black grand jurors. The commissioners then twice culled this group to create a list of 400 prospective jurors, 7% of whom were Negro—a further reduction by one-half.

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[8] Section 4 of the 1875 Civil Rights Act, 18 Stat. 336, now codified as 18 U. S. C. § 243, affirms and reinforces this constitutional right: "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

The percentage dropped to 5% on petitioner's grand jury venire and to zero on the grand jury that actually indicted him. Against this background, petitioner argues that the substantial disparity between the proportion of blacks chosen for jury duty and the proportion of blacks in the eligible population raises a strong inference that racial discrimination and not chance has produced this result because elementary principles of probability make it extremely unlikely that a random selection process would, at each stage, have so consistently reduced the number of Negroes.[9]

This Court has never announced mathematical standards for the demonstration of "systematic" exclusion of blacks but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors. The progressive decimation of potential Negro grand jurors is indeed striking here, but we do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral. The racial designation on both the questionnaire and the information card provided a clear and easy opportunity for racial discrimination. At two crucial steps in the selection process, when the number of returned questionnaires was reduced to 2,000 and when the final selection of the 400 names was made, these racial identifications were visible on the forms used by the jury commissioners, although there is no evidence that the commissioners consciously selected by race. The situa-

[9] We take note, as we did in *Whitus* v. *Georgia*, 385 U. S. 545, 552 n. 2 (1967), of petitioner's demonstration that under one statistical technique of calculating probability, the chances that 27 Negroes would have been selected at random for the 400-member final jury list, when 1,015 out of the 7,374 questionnaires returned were from Negroes, are one in 20,000. Brief for Petitioner 18 n. 18.

tion here is thus similar to *Avery* v. *Georgia*, 345 U. S. 559 (1953), where the Court sustained a challenge to an array of petit jurors in which the names of prospective jurors had been selected from segregated tax lists. Juror cards were prepared from these lists, yellow cards being used for Negro citizens and white cards for whites. Cards were drawn by a judge, and there was no evidence of specific discrimination. The Court held that such evidence was unnecessary, however, given the fact that no Negroes had appeared on the final jury: "Obviously that practice makes it easier for those to discriminate who are of a mind to discriminate." 345 U. S., at 562. Again, in *Whitus* v. *Georgia*, 385 U. S. 545 (1967), the Court reversed the conviction of a defendant who had been tried before an all-white petit jury. Jurors had been selected from a one-volume tax digest divided into separate sections of Negroes and whites; black taxpayers also had a "(c)" after their names as required by Georgia law at the time. The jury commissioners testified that they were not aware of the "(c)" appearing after the names of the Negro taxpayers; that they had never included or excluded anyone because of race; that they had placed on the jury list only those persons whom they knew personally; and that the jury list they compiled had had no designation of race on it. The county from which jury selection was made was 42% Negro, and 27% of the county's taxpayers were Negro. Of the 33 persons drawn for the grand jury panel, three (9%) were Negro, while on the 19-member grand jury only one was Negro; on the 90-man venire from which the petit jury was selected, there were seven Negroes (8%), but no Negroes appeared on the actual jury that tried petitioner. The Court held that this combination of factors constituted a prima facie case of discrimination, and a similar conclusion is mandated in the present case.

Once a prima facie case of invidious discrimination is

established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result. *Turner* v. *Fouche*, 396 U. S. 346, 361 (1970); *Eubanks* v. *Louisiana*, 356 U. S. 584, 587 (1958). The State has not carried this burden in this case; it has not adequately explained the elimination of Negroes during the process of selecting the grand jury that indicted petitioner. As in *Whitus* v. *Georgia*, *supra*, the clerk of the court, who was also a member of the jury commission, testified that no consideration was given to race during the selection procedure. App. 34. The Court has squarely held, however, that affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion. *Turner* v. *Fouche*, *supra*, at 361; *Jones* v. *Georgia*, 389 U. S. 24, 25 (1967); *Sims* v. *Georgia*, 389 U. S. 404, 407 (1967). "The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner." *Hernandez* v. *Texas*, 347 U. S., at 482. See also *Norris* v. *Alabama*, 294 U. S., at 598. The clerk's testimony that the mailing list for questionnaires was compiled from nonracial sources is not, in itself, adequate to meet the State's burden of proof, for the opportunity to discriminate was presented at later stages in the process. The commissioners, in any event, had a duty "not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds." *Hill* v. *Texas*, 316 U. S. 400, 404 (1942). See also *Smith* v. *Texas*, 311 U. S. 128, 130 (1940). Cf. *Carter* v. *Jury Commission*, 396 U. S. 320, 330 (1970). We conclude, therefore, that "the opportunity for discrimination was present and [that it cannot be said] on this record that it was not resorted to by the commissioners." *Whitus* v. *Georgia*, *supra*, at 552.

II

Petitioner also challenges the Louisiana statutory exemption of women who do not volunteer for grand jury service. Article 402, La. Code Crim. Proc. This claim is novel in this Court and, when urged by a male, finds no support in our past cases. The strong constitutional and statutory policy against racial discrimination has permitted Negro defendants in criminal cases to challenge the systematic exclusion of Negroes from the grand juries that indicted them. Also, those groups arbitrarily excluded from grand or petit jury service are themselves afforded an appropriate remedy. Cf. *Carter* v. *Jury Commission, supra.* But there is nothing in past adjudications suggesting that petitioner himself has been denied equal protection by the alleged exclusion of women from grand jury service. Although the Due Process Clause guarantees petitioner a fair trial, it does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury. In *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), the Court held that because trial by jury in criminal cases under the Sixth Amendment is "fundamental to the American scheme of justice," *id.,* at 149, such a right was guaranteed to defendants in state courts by the Fourteenth Amendment, but the Court has never held that federal concepts of a "grand jury," binding on the federal courts under the Fifth Amendment, are obligatory for the States. *Hurtado* v. *California,* 110 U. S. 516, 538 (1884).

Against this background and because petitioner's conviction has been set aside on other grounds, we follow our usual custom of avoiding decision of constitutional issues unnecessary to the decision of the case before us. *Burton* v. *United States,* 196 U. S. 283, 295 (1905). See *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring). The

State may or may not recharge petitioner, a properly constituted grand jury may or may not return another indictment, and petitioner may or may not be convicted again. See *Ballard* v. *United States*, 329 U. S. 187, 196 (1946).

Reversed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

While I join Part I of the Court's opinion, I am convinced we should also reach the constitutionality of Louisiana's exclusion of women from jury service. The issue is squarely presented, it has been thoroughly briefed and argued, and it is of recurring importance. The Court purports to follow "our usual custom" of avoiding unnecessary constitutional issues. But that cannot be the sole rationale, for both questions are of constitutional dimension. We could just as well say that deciding the constitutionality of excluding women from juries renders it unnecessary to reach the question of racial exclusion.

It can be argued that the racial exclusion admits of the "easier" analysis. But this Court does not sit to decide only "easy" questions. And even when faced with "hard" constitutional questions, we have often decided cases on alternate grounds where a decision on only one would have been dispositive. See, *e. g.*, *Dunn* v. *Blumstein*, *ante*, p. 330.

Petitioner complains of the exclusion of blacks and women from the grand jury which indicted him. Conceivably, he could have also complained of the exclusion of several other minority groups. Would he then be relegated to suffer repetitive re-indictment and re-conviction while this court considered the exclusion of each group in a separate lawsuit?

I believe the time has come to reject the dictum in *Strauder* v. *West Virginia*, 100 U. S. 303, 310, that a State "may confine" jury service "to males." I would here reach the question we reserved in *Hoyt* v. *Florida*, 368 U. S. 57, 60, and hold that Art. 402, La. Code Crim. Proc.,[1] as applied to exclude women as a class from Lafayette Parish jury rolls, violated petitioner Alexander's constitutional right to an impartial jury drawn from a group representative of a cross-section of the community.[2]

It is irrelevant to our analysis that Alexander attacks the composition of the grand jury that indicted him, not the petit jury which convicted him, for it is clear that a State which has a grand jury procedure must administer that system consonantly with the Federal Constitution. The Court asserts, however, that "federal concepts" of a grand jury do not obligate the States, and cites *Hurtado* v. *California*, 110 U. S. 516, 538. *Ante*, at 633. But *Hurtado* supports no such proposition. That case merely held that the Fifth Amendment grand jury requirement was not binding on the States. It said nothing as to the constitutional requirements which obtain once a State chooses to provide a grand jury, and we are directed to no other case which does speak to the subject. But this Court has said time and again, regardless of a State's freedom to reject the federal grand jury, and to reject even the petit jury for offenses punishable by less than six months' imprisonment, *Baldwin* v. *New York*, 399 U. S. 66, "Once the State chooses to provide grand

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[1] Article 402, La. Code Crim. Proc.: "A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service."

[2] The fact that Alexander is a male challenging the exclusion of females from the jury rolls is not of significance, for his claim rests, not on equal protection principles, but on the right of any defendant to an impartial jury, no matter what his sex or race.

and petit juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria . . . ." *Carter* v. *Jury Commission,* 396 U. S. 320, 330.[3]

It is furthermore clear that just such a "federal constitutional criteri[on]" is that the grand jury, just as the petit jury, must be drawn from a representative cross-section of the community. The Court was speaking of both grand and petit juries in *Carter* v. *Jury Commission, supra,* when, quoting *Smith* v. *Texas,* 311 U. S. 128, 130, it *defined* the jury as "a body truly representative of the community." 396 U. S., at 330. The Court was speaking of grand and petit juries when it said in *Brown* v. *Allen,* 344 U. S. 443, 474: "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, *so long as the source reasonably reflects a cross-section of the population* suitable in character and intelligence for that civic duty." (Emphasis supplied.) As Mr. Justice Black said, speaking for the Court in *Pierre* v. *Louisiana,* 306 U. S. 354, 358: "Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races . . . are excluded as such from jury service." (Footnote omitted.)

The requirement that a jury reflect a cross-section of the community occurs throughout our jurisprudence: "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, neces-

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[3] While *Carter* arose under the Equal Protection Clause, and concerned the right of prospective jurors excluded from the venire solely by reason of their race, the analysis is the same in the instant case, where the question is the accused's right to an impartial jury. *Turner* v. *Louisiana,* 379 U. S. 466.

sarily contemplates an impartial jury drawn from a cross-section of the community. *Smith* v. *Texas*, 311 U. S. 128, 130; *Glasser* v. *United States*, 315 U. S. 60, 85." *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220. Accord, *Williams* v. *Florida*, 399 U. S. 78, 100; *Witherspoon* v. *Illinois*, 391 U. S. 510, 520; *Ballard* v. *United States*, 329 U. S. 187, 192–193; *Labat* v. *Bennett*, 365 F. 2d 698, 722–724.[4]

This is precisely the constitutional infirmity of the Louisiana statute. For a jury list from which women have been systematically excluded is not representative of the community.

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim

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[4] The cases most precisely articulating the requirement that a jury reflect a cross section of the community arose under our supervisory power over the federal courts. See, *e. g.*, *Ballard* v. *United States*, 329 U. S. 187; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; *Glasser* v. *United States*, 315 U. S. 60. The detail with which these cases were written, however, simply reflects our obligation to provide guidelines for the federal system. It is consistent with our principle of federalism that the States be permitted greater latitude in fashioning their jury-selection procedures, but to avoid constitutional infirmity the result must be designed to produce a representative cross section of the community. *Brown* v. *Allen*, 344 U. S. 443, 474; *Carter* v. *Jury Commission*, 396 U. S. 320, 322, 333.

> that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. *The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.*" *Ballard* v. *United States, supra,* at 193–194. (Emphasis supplied; footnotes omitted.)

The record before us, moreover, indisputably reveals that such a systematic exclusion operated with respect to the Lafayette Parish jury lists. There were no women on the grand jury that indicted petitioner, and there were no women on the venire from which the jury was chosen. While the venire was selected from returns to questionnaires sent to parish residents, not a single one of the some 11,000 questionnaires was even sent to a woman. This was done deliberately.[5]

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[5] Mr. LeBlanc, clerk of the court in Lafayette Parish, and a member of the parish jury commission, testified as to the process by which the venire was chosen at the hearing on the motion to quash Alexander's indictment:

"A. The slips or list that are put in the general venire box are made from questionnaires that I mailed out.

. . . . . .

"Q. Now, who is this questionnaire sent to? How is that determined?

"A. To the different people in the Parish by the registrar of voter's list and the telephone book, city directory, different lists that are

The State relies on the fact that the automatic exemption it grants to women is the same as the one upheld in *Hoyt* v. *Florida*, 368 U. S. 57. In *Hoyt*, however, there were women on the jury rolls, and the jury commissioners had made good-faith efforts to include women on the jury lists despite the fact that they had an automatic exemption unless they volunteered for service. *Id.*, at 69 (Warren, C. J., concurring). Here, on the other hand, only the feeblest efforts were made to interest women in service,[6] and there was testimony that only a single woman had filled out a jury service questionnaire.[7] This, out of a parish population of 45,000 adults, 52% of whom were female.

The absolute exemption provided by Louisiana, and no other State,[8] betrays a view of a woman's role which

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submitted by school board or any list that we can find that we think we got address [*sic*] for the mixed race one way or the other.

. . . . .

"Q. Was the questionnaire mailed to any women at all?

"A. We have received some that was filled in by some ladies. I think one.

"Q. Did you mail any to any women intentionally or did you intentionally exclude women when you mailed them?

"A. We didn't mail any to the women." App. 35, 53.

[6] The only evidence in the record that any effort whatsoever was expended to encourage women to volunteer for jury service was a statement by Mr. LeBlanc that he had "discussed that with the Assistant District Attorney," and that he had "sent her at [*sic*] different women's clubs to explain to the women the possibility of being on the jury." App. 54. He also averred that "we're working on the women to submit names and intention to serve." *Ibid.*

As indicated in n. 5, *supra*, however, these efforts produced but a single questionnaire from a woman. The 11,000 questionnaires sent to men, on the other hand, resulted in over 7,000 responses. App. 15.

[7] Testimony of Mr. LeBlanc. See nn. 5–6, *supra*.

[8] No State now prohibits women from service on juries altogether, Alabama's prohibition having been found unconstitutional in *White*

cannot withstand scrutiny under modern standards. We once upheld the constitutionality of a state law denying to women the right to practice law, solely on grounds of sex. *Bradwell* v. *State,* 16 Wall. 130. The rationale underlying Art. 402 of the Louisiana Code is the same as that which was articulated by Justice Bradley in *Bradwell:*

> "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .
>
> ". . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases." *Id.,* at 141–142.

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v. *Crook,* 251 F. Supp. 401 (MD Ala. 1966). Most States afford equal treatment to men and women, although exemptions are frequently provided for women who are pregnant or who have children under 18 at home. Five States now allow women an absolute exemption, based solely on their sex, but they must affirmatively request it. Ga. Code Ann. § 59–124 (1965); Mo. Const., Art. I, § 22 (b); N. Y. Judiciary Law § 507 (7) (1968); R. I. Gen. Laws Ann. § 9–9–11 (1970); Tenn. Code Ann. § 22–101, § 22–108 (1955).

Classifications based on sex are no longer insulated from judicial scrutiny by a legislative judgment that "woman's place is in the home," or that woman is by her "nature" ill-suited for a particular task. See, *e. g.*, *Reed* v. *Reed*, 404 U. S. 71. But such a judgment is precisely that which underpins the absolute exemption from jury service at issue.[9] Insofar as *Hoyt*, *supra*,

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[9] Perhaps the purest articulation of the objection to woman jury service is that of Judge Turner, dissenting in *Rosencrantz* v. *Territory*, 2 Wash. Ter. 267, 5 P. 305 (1884), a case in which a female defendant challenged the grand jury which indicted her on the ground that it *included* married women living with their husbands. The challenge was rejected over Judge Turner's dissent:

"It is said that the rights of the weaker sex, if I may now call them so, are more regarded than in the days of Blackstone; and that the theory of that day, that women were unfitted by physical constitution and mental characteristics to assume and perform the civil and political duties and obligations of citizenship, has been exploded by the advanced ideas of the nineteenth century. This may be true. No man honors the sex more than I. None has witnessed more cheerfully the improvement in the laws of the States, and particularly in the laws of this Territory, whereby many of the disabilities of that day are removed from them, and their just personal and property rights put upon an equal footing with those of men. I cannot say, however, that I wish to see them perform the duties of jurors. The liability to perform jury duty is an obligation, not a right. In the case of woman, it is not necessary that she should accept the obligation to secure or maintain her rights. If it were, I should stifle all expression of the repugnance that I feel at seeing her introduced into associations and exposed to influences which, however others regard it, must, in my opinion, shock and blunt those fine sensibilities, the possession of which is her chiefest charm, and the protection of which, under the religion and laws of all countries, civilized or semi-civilized, is her most sacred right.

"If one woman is competent as a juror, all women having the same qualifications are competent. If women may try one case, they may try all cases. It is unnecessary to say more, to suggest the shocking possibilities to which our wives, mothers, sisters, and

embodies this discredited stereotype, it should be firmly disapproved.[10] See Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N. Y. U. L. Rev. 675, 708–721 (1971).

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daughters may be exposed . . . . These observations, however, are not pertinent here. The question is, What is the law?

"I say, that the laws now concerning the important incidents of a jury trial are, by express constitutional provision, what they were at the common law, and that under that law a jury was no jury unless it was composed of men." *Id.*, at 278–279, 5 P., at 309–310.

[10] In *Fay* v. *New York*, 332 U. S. 261, there is also a dictum approving the constitutionality of excluding women from jury service. Relying solely on the proposition that: "Until recently, and for nearly a half-century after the Fourteenth Amendment was adopted, it was universal practice in the United States to allow only men to sit on juries," the Court opined that "woman jury service has not so become a part of the textual or customary law of the land that one convicted of crime must be set free by this Court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood." *Id.*, at 289–290. This dictum was totally irrelevant to the holding in *Fay*, approving New York's special "blue-ribbon" jury system, for the Court stated flatly that: "The evidence does not show that women are excluded from the special jury." *Id.*, at 278. Indeed, there were women on the very jury which was at issue in the case. *Ibid.*

The "nose-counting" approach which led to the *Fay* Court's refusal to recognize woman jury service as "part of the textual or customary law of the land" has, of course, been thoroughly undermined by subsequent events. See n. 8, *supra*. It has been suggested that the decision itself was overruled by *Duncan* v. *Louisiana*, 391 U. S. 145. *Id.*, at 185 n. 25, and text following (Harlan, J., dissenting). And what little there may be left after *Duncan*, is, like *Strauder* v. *West Virginia*, 100 U. S. 303, and *Hoyt* v. *Florida*, 368 U. S. 57, based on an obsolete view of woman's role which does not square with reality. "[The *Fay*] dictum . . . calls to mind—in its total reliance on historical practice as justification for sex discrimination—the . . . observation . . . that attitudes can be more formidable than arguments." Johnston & Knapp, Sex

Louisiana says, however, that women are not totally excluded from service; they may volunteer. The State asserts it is impractical to require women affirmatively to claim the statutory exemption because of the large numbers who would do so. This argument misses the point. Neither man nor woman can be expected to volunteer for jury service. *Hoyt, supra,* at 64–65. See L. Kanowitz, Women and the Law 30 (1969). Thus, the automatic exemption, coupled with the failure even to apprise parish women of their right to volunteer, results in as total an exclusion as would obtain if women were not permitted to serve at all.

Some violations of due process of law may be excused in the context of a criminal trial, if the error cannot be shown to have had an effect on the outcome. See, *e. g.*, *Giglio* v. *United States, ante,* p. 150; *Napue* v. *Illinois,* 360 U. S. 264, 272. But the right to a representative jury is one which would be trivialized were a similar requirement imposed:

> "We can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof. It may be absent in one case and present in another; it may gradually and silently erode the jury system before it becomes evident. But it is no less real or meaningful for our purposes. If the constitutional right to a jury impartially drawn from a cross-section of the community has been violated, we should vindicate

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Discrimination by Law: A Study in Judicial Perspective, 46 N. Y. U. L. Rev. 675, 715 (1971). See *State* v. *Emery,* 224 N. C. 581, 601, 31 S. E. 2d 858, 871 (1944) (Seawell, J., dissenting). See also *Rosencrantz* v. *Territory, supra* (Turner, J., dissenting).

> that right even though the effect of the violation has not yet put in a tangible appearance. Otherwise that right may be irretrievably lost in a welter of evidentiary rules." *Fay* v. *New York*, 332 U. S. 261, 300 (Murphy, J., dissenting).

A statutory procedure which has the effect of excluding all women does not produce a representative jury, and is therefore repugnant to our constitutional scheme. Cf. *White* v. *Crook*, 251 F. Supp. 401, 408–409 (MD Ala. 1966). For these reasons, I would hold Art. 402, La. Code Crim. Proc., to be unconstitutional.

STANLEY *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 70–5014. Argued October 19, 1971—Decided April 3, 1972

Petitioner, an unwed father whose children, on the mother's death, were declared state wards and placed in guardianship, attacked the Illinois statutory scheme as violative of equal protection. Under that scheme the children of unmarried fathers, upon the death of the mother, are declared dependents without any hearing on parental fitness and without proof of neglect, though such hearing and proof are required before the State assumes custody of children of married or divorced parents and unmarried mothers. The Illinois Supreme Court, holding that petitioner could properly be separated from his children upon mere proof that he and the dead mother had not been married and that petitioner's fitness as a father was irrelevant, rejected petitioner's claim. *Held:*

1. Under the Due Process Clause of the Fourteenth Amendment petitioner was entitled to a hearing on his fitness as a parent before his children were taken from him. Pp. 647–658.

(a) The fact that petitioner can apply for adoption or for custody and control of his children does not bar his attack on the dependency proceeding. Pp. 647–649.

(b) The State cannot, consistently with due process requirements, merely presume that unmarried fathers in general and petitioner in particular are unsuitable and neglectful parents. Parental unfitness must be established on the basis of individualized proof. See *Bell* v. *Burson,* 402 U. S. 535. Pp. 649–658.

2. The denial to unwed fathers of the hearing on fitness accorded to all other parents whose custody of their children is challenged by the State constitutes a denial of equal protection of the laws. P. 658.

45 Ill. 2d 132, 256 N. E. 2d 814, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, and in Parts I and II of which DOUGLAS, J., joined. BURGER, C. J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post,* p. 659. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Patrick T. Murphy argued the cause and filed a brief for petitioner.

Morton E. Friedman, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William J. Scott,* Attorney General, and *Joel M. Flaum,* First Assistant Attorney General.

Jonathan Weiss and *E. Judson Jennings* filed a brief for the Center on Social Welfare Policy and Law as *amicus curiae* urging reversal.

Calvin Sawyier and *Richard L. Mandel* filed a brief for the Child Care Association of Illinois, Inc., as *amicus curiae.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Joan Stanley lived with Peter Stanley intermittently for 18 years, during which time they had three children.[1] When Joan Stanley died, Peter Stanley lost not only her but also his children. Under Illinois law, the children of unwed fathers become wards of the State upon the death of the mother. Accordingly, upon Joan Stanley's death, in a dependency proceeding instituted by the State of Illinois, Stanley's children[2] were declared wards of the State and placed with court-appointed guardians. Stanley appealed, claiming that he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws guaranteed him by the Fourteenth Amendment. The Illinois Supreme Court accepted the fact that Stanley's own unfitness had not been established but rejected the equal protection claim, holding that Stanley could properly be separated from his children upon proof of the single fact that he and the dead mother

[1] Uncontradicted testimony of Peter Stanley, App. 22.

[2] Only two children are involved in this litigation.

had not been married. Stanley's actual fitness as a father was irrelevant. *In re Stanley,* 45 Ill. 2d 132, 256 N. E. 2d 814 (1970).

Stanley presses his equal protection claim here. The State continues to respond that unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children. We granted certiorari, 400 U. S. 1020 (1971), to determine whether this method of procedure by presumption could be allowed to stand in light of the fact that Illinois allows married fathers—whether divorced, widowed, or separated—and mothers—even if unwed—the benefit of the presumption that they are fit to raise their children.

I

At the outset we reject any suggestion that we need not consider the propriety of the dependency proceeding that separated the Stanleys because Stanley might be able to regain custody of his children as a guardian or through adoption proceedings. The suggestion is that if Stanley has been treated differently from other parents, the difference is immaterial and not legally cognizable for the purposes of the Fourteenth Amendment. This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone. Cf. *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969). Surely, in the case before us, if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.

It is clear, moreover, that Stanley does not have the means at hand promptly to erase the adverse consequences of the proceeding in the course of which his children were declared wards of the State. It is first

urged that Stanley could act to adopt his children. But under Illinois law, Stanley is treated not as a parent but as a stranger to his children, and the dependency proceeding has gone forward on the presumption that he is unfit to exercise parental rights. Insofar as we are informed, Illinois law affords him no priority in adoption proceedings. It would be his burden to establish not only that he would be a suitable parent but also that he would be the most suitable of all who might want custody of the children. Neither can we ignore that in the proceedings from which this action developed, the "probation officer," see App. 17, the assistant state's attorney, see *id.*, at 29–30, and the judge charged with the case, see *id.*, at 16–18, 23, made it apparent that Stanley, unmarried and impecunious as he is, could not now expect to profit from adoption proceedings.[3] The Illinois Supreme Court apparently recognized some or all of these considerations, because it did not suggest that Stanley's case was undercut by his failure to petition for adoption.

Before us, the State focuses on Stanley's failure to petition for "custody and control"—the second route by which, it is urged, he might regain authority for his children. Passing the obvious issue whether it would be futile or burdensome for an unmarried father—without funds and already once presumed unfit—to petition for custody, this suggestion overlooks the fact that legal custody is not parenthood or adoption. A person appointed guardian in an action for custody and control is subject to removal at any time without such

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[3] The Illinois Supreme Court's opinion is not at all contrary to this conclusion. That court said: "[T]he trial court's comments clearly indicate the court's willingness to consider *a future* request by the father for *custody and guardianship*." 45 Ill. 2d 132, 135, 256 N. E. 2d 814, 816. (Italics added.) See also the comment of Stanley's counsel on oral argument: "If Peter Stanley could have adopted his children, we would not be here today." Tr. of Oral Arg. 7.

cause as must be shown in a neglect proceeding against a parent. Ill. Rev. Stat., c. 37, § 705–8. He may not take the children out of the jurisdiction without the court's approval. He may be required to report to the court as to his disposition of the children's affairs. Ill. Rev. Stat., c. 37, § 705–8. Obviously then, even if Stanley were a mere step away from "custody and control," to give an unwed father only "custody and control" would still be to leave him seriously prejudiced by reason of his status.

We must therefore examine the question that Illinois would have us avoid: Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant? We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.

II

Illinois has two principal methods of removing nondelinquent children from the homes of their parents. In a dependency proceeding it may demonstrate that the children are wards of the State because they have no surviving parent or guardian. Ill. Rev. Stat., c. 37, §§ 702–1, 702–5. In a neglect proceeding it may show that children should be wards of the State because the present parent(s) or guardian does not provide suitable care. Ill. Rev. Stat., c. 37, §§ 702–1, 702–4.

The State's right—indeed, duty—to protect minor children through a judicial determination of their interests in a neglect proceeding is not challenged here. Rather, we are faced with a dependency statute that empowers state officials to circumvent neglect proceedings

on the theory that an unwed father is not a "parent" whose existing relationship with his children must be considered.[4] "Parents," says the State, "means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent," Ill. Rev. Stat., c. 37, § 701–14, but the term does not include unwed fathers.

Under Illinois law, therefore, while the children of all parents can be taken from them in neglect proceedings, that is only after notice, hearing, and proof of such unfitness as a parent as amounts to neglect, an unwed father is uniquely subject to the more simplistic dependency proceeding. By use of this proceeding, the State, on showing that the father was not married to the mother, need not prove unfitness in fact, because it is presumed at law. Thus, the unwed father's claim of parental qualification is avoided as "irrelevant."

In considering this procedure under the Due Process Clause, we recognize, as we have in other cases, that due process of law does not require a hearing "in every conceivable case of government impairment of private interest." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894 (1961). That case explained that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation" and firmly established that "what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental

[4] Even while refusing to label him a "legal parent," the State does not deny that Stanley has a special interest in the outcome of these proceedings. It is undisputed that he is the father of these children, that he lived with the two children whose custody is challenged all their lives, and that he has supported them.

action." *Id.*, at 895; *Goldberg* v. *Kelly*, 397 U. S. 254, 263 (1970).

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U. S. 77, 95 (1949) (Frankfurter, J., concurring).

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923), "basic civil rights of man," *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May* v. *Anderson*, 345 U. S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska*, *supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner* v. *Oklahoma*, *supra*, at 541, and the Ninth Amendment, *Griswold* v. *Connecticut*, 381 U. S. 479, 496 (1965) (Goldberg, J., concurring).

Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that

such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. *Levy* v. *Louisiana*, 391 U. S. 68, 71–72 (1968). "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." *Glona* v. *American Guarantee Co.*, 391 U. S. 73, 75–76 (1968).

These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial.

For its part, the State has made its interest quite plain: Illinois has declared that the aim of the Juvenile Court Act is to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" and to "strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal . . . ." Ill. Rev. Stat., c. 37, § 701–2. These are legitimate interests, well within the power of the State to implement. We do not question the assertion that neglectful parents may be separated from their children.

But we are here not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible. What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a

fit father, the State spites its own articulated goals when it needlessly separates him from his family.

In *Bell* v. *Burson*, 402 U. S. 535 (1971), we found a scheme repugnant to the Due Process Clause because it deprived a driver of his license without reference to the very factor (there fault in driving, here fitness as a parent) that the State itself deemed fundamental to its statutory scheme. Illinois would avoid the self-contradiction that rendered the Georgia license suspension system invalid by arguing that Stanley and all other unmarried fathers can reasonably be presumed to be unqualified to raise their children.[5]

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[5] Illinois says in its brief, at 21–23.

"[T]he only relevant consideration in determining the propriety of governmental intervention in the raising of children is whether the best interests of the child are served by such intervention.

"In effect, Illinois has imposed a statutory presumption that the best interests of a particular group of children necessitates some governmental supervision in certain clearly defined situations. The group of children who are illegitimate are distinguishable from legitimate children not so much by their status at birth as by the factual differences in their upbringing. While a legitimate child usually is raised by both parents with the attendant familial relationships and a firm concept of home and identity, the illegitimate child normally knows only one parent—the mother. . . .

". . . The petitioner has premised his argument upon particular factual circumstances—a lengthy relationship with the mother . . . a familial relationship with the two children, and a general assumption that this relationship approximates that in which the natural parents are married to each other.

". . . Even if this characterization were accurate (the record is insufficient to support it) it would not affect the validity of the statutory definition of parent. . . . The petitioner does not deny that the children are illegitimate. The record reflects their natural mother's death. Given these two factors, grounds exist for the State's intervention to ensure adequate care and protection for these children. This is true whether or not this particular petitioner assimilates all or none

It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents.[6] It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children.[7] This much the State

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of the normal characteristics common to the classification of fathers who are not married to the mothers of their children."

See also Illinois' Brief 23 ("The comparison of married and putative fathers involves exclusively factual differences. The most significant of these are the presence or absence of the father from the home on a day-to-day basis and the responsibility imposed upon the relationship"), *id.*, at 24 (to the same effect), *id.*, at 31 (quoted below in n. 6), *id.*, at 24–26 (physiological and other studies are cited in support of the proposition that men are not naturally inclined to childrearing), and Tr. of Oral Arg. 31 ("We submit that both based on history or [*sic*] culture the very real differences . . . between the married father and the unmarried father, in terms of their interests in children and their legal responsibility for their children, that the statute here fulfills the compelling governmental objective of protecting children . . .").

[6] The State speaks of "the general disinterest of putative fathers in their illegitimate children" (Brief 8) and opines that "[i]n most instances, the natural father is a stranger to his children." Brief 31.

[7] See *In re Mark T.*, 8 Mich. App. 122, 154 N. W. 2d 27 (1967). There a panel of the Michigan Court of Appeals in unanimously affirming a circuit court's determination that the father of an illegitimate son was best suited to raise the boy, said:

"The appellants' presentation in this case proceeds on the assumption that placing Mark for adoption is inherently preferable to rearing by his father, that uprooting him from the family which he knew from birth until he was a year and a half old, secretly institutionalizing him and later transferring him to strangers is so incontrovertibly better that no court has the power even to consider the matter. Hardly anyone would even suggest such a proposition if we were talking about a child born in wedlock.

"We are not aware of any sociological data justifying the assumption that an illegitimate child reared by his natural father is less likely to receive a proper upbringing than one reared by his natural father who was at one time married to his mother, or that the

readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would have been furthered by leaving custody in him.

Carrington v. *Rash,* 380 U. S. 89 (1965), dealt with a similar situation. There we recognized that Texas had a powerful interest in restricting its electorate to bona fide residents. It was not disputed that most servicemen stationed in Texas had no intention of remaining in the State; most therefore could be deprived of a vote in state affairs. But we refused to tolerate a blanket exclusion depriving all servicemen of the vote, when some servicemen clearly were bona fide residents and when "more precise tests," *id.,* at 95, were available to distinguish members of this latter group. "By forbidding a soldier ever to controvert the presumption of nonresidence," *id.,* at 96, the State, we said, unjustifiably effected a substantial deprivation. It viewed people one-dimensionally (as servicemen) when a finer perception could readily have been achieved by assessing a serviceman's claim to residency on an individualized basis.

> "We recognize that special problems may be involved in determining whether servicemen have actually acquired a new domicile in a State for franchise purposes. We emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence. But [the challenged] provision goes beyond such rules.

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stigma of illegitimacy is so pervasive it requires adoption by strangers and permanent termination of a subsisting relationship with the child's father." *Id.,* at 146, 154 N. W. 2d, at 39.

> '[T]he presumption here created is . . . definitely conclusive—incapable of being overcome by proof of the most positive character.'" *Id.*, at 96.

"All servicemen not residents of Texas before induction," we concluded, "come within the provision's sweep. Not one of them can ever vote in Texas, no matter" what their individual qualifications. *Ibid.* We found such a situation repugnant to the Equal Protection Clause.

Despite *Bell* and *Carrington*, it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency.[8] Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Procedure by presumption is always cheaper and easier

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[8] Cf. *Reed* v. *Reed*, 404 U. S. 71, 76 (1971). "Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. . . . [But to] give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Carrington* v. *Rash*, 380 U. S. 89, 96 (1965), teaches the same lesson. ". . . States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. *Oyama* v. *California*, 332 U. S. 633. By forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment."

than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.[9]

Bell v. *Burson* held that the State could not, while purporting to be concerned with fault in suspending a driver's license, deprive a citizen of his license without a hearing that would assess fault. Absent fault, the State's declared interest was so attenuated that administrative convenience was insufficient to excuse a hearing where evidence of fault could be considered. That drivers involved in accidents, as a statistical matter, might be very likely to have been wholly or partially at fault did not foreclose hearing and proof in specific cases before licenses were suspended.

We think the Due Process Clause mandates a similar result here. The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit

[9] We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care, under the scheme here held invalid, Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adoption proceeding.

Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined. The Illinois law governing procedure in juvenile cases, Ill. Rev. Stat., c. 37, § 704–1 *et seq.*, provides for personal service, notice by certified mail, or for notice by publication when personal or certified mail service cannot be had or when notice is directed to unknown respondents under the style of "All whom it may Concern." Unwed fathers who do not promptly respond cannot complain if their children are declared wards of the State. Those who do respond retain the burden of proving their fatherhood.

father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

III

The State of Illinois assumes custody of the children of married parents, divorced parents, and unmarried mothers only after a hearing and proof of neglect. The children of unmarried fathers, however, are declared dependent children without a hearing on parental fitness and without proof of neglect. Stanley's claim in the state courts and here is that failure to afford him a hearing on his parental qualifications while extending it to other parents denied him equal protection of the laws. We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.[10]

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[10] Predicating a finding of constitutional invalidity under the Equal Protection Clause of the Fourteenth Amendment on the observation that a State has accorded bedrock procedural rights to some, but not to all similarly situated, is not contradictory to our holding in *Picard* v. *Connor*, 404 U. S. 270 (1971). In that case a due process, rather than an equal protection, claim was raised in the state courts. The federal courts were, in our opinion, barred from reversing the state conviction on grounds of contravention of the Equal Protection Clause when that clause had not been referred to for consideration by the state authorities. Here, in contrast, we dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court.

For the same reason the strictures of *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969), and *Hill* v. *California*, 401 U. S. 797 (1971), have been fully observed.

The judgment of the Supreme Court of Illinois is reversed and the case is remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS joins in Parts I and II of this opinion.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN concurs, dissenting.

The only constitutional issue raised and decided in the courts of Illinois in this case was whether the Illinois statute that omits unwed fathers from the definition of "parents" violates the Equal Protection Clause. We granted certiorari to consider whether the Illinois Supreme Court properly resolved that equal protection issue when it unanimously upheld the statute against petitioner Stanley's attack.

No due process issue was raised in the state courts; and no due process issue was decided by any state court. As MR. JUSTICE DOUGLAS said for this Court in *State Farm Mutual Automobile Ins. Co.* v. *Duel,* 324 U. S. 154, 160 (1945), "Since the [state] Supreme Court did not pass on the question, we may not do so." We had occasion more recently to deal with this aspect of the jurisdictional limits placed upon this Court by 28 U. S. C. § 1257 when we decided *Hill* v. *California,* 401 U. S. 797 (1971). Having rejected the claim that *Chimel* v. *California,* 395 U. S. 752 (1969), should be retroactively applied to invalidate petitioner Hill's conviction on the ground that a search incident to arrest was overly extensive in scope, the Court noted Hill's additional contention that his personal diary, which was one of the items

of evidence seized in that search, should have been excluded on Fifth Amendment grounds as well. MR. JUSTICE WHITE, in his opinion for the Court, concluded that we lacked jurisdiction to consider the Fifth Amendment contention:

> "Counsel for [the petitioner] conceded at oral argument that the Fifth Amendment issue was not raised at trial. Nor was the issue raised, briefed, or argued in the California appellate courts. [Footnote omitted.] The petition for certiorari likewise ignored it. In this posture of the case, the question, although briefed and argued here, is not properly before us." 401 U. S., at 805.

In the case now before us, it simply does not suffice to say, as the Court in a footnote does say, that "we dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court." *Ante,* at 658 n. 10. The Court's method of analysis seems to ignore the strictures of JUSTICES DOUGLAS and WHITE, but the analysis is clear: the Court holds *sua sponte* that the Due Process Clause requires that Stanley, the unwed biological father, be accorded a hearing as to his fitness as a parent before his children are declared wards of the state court; the Court then reasons that since Illinois recognizes such rights to due process in married fathers, it is required by the Equal Protection Clause to give such protection to unmarried fathers. This "method of analysis" is, of course, no more or less than the use of the Equal Protection Clause as a shorthand condensation of the entire Constitution: a State may not deny *any* constitutional right to some of its citizens without violating the Equal Protection Clause through its failure to deny such rights to *all* of its citizens. The limits on this Court's jurisdiction are not properly expandable by the use of such semantic devices as that.

Not only does the Court today use dubious reasoning in dealing with limitations upon its jurisdiction, it proceeds as well to strike down the Illinois statute here involved by "answering" arguments that are nowhere to be found in the record or in the State's brief—or indeed in the oral argument. I have been unable, for example, to discover where or when the State has advanced any argument that "it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children." *Ante,* at 647. Nor can I discover where the State has "argu[ed] that Stanley and all other unmarried fathers can reasonably be presumed to be unqualified to raise their children." *Ante,* at 653. Or where anyone has even remotely suggested the "argu[ment] that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's." *Ante,* at 656. On the other hand, the arguments actually advanced by the State are largely ignored by the Court.[1]

[1] In reaching out to find a due process issue in this case, the Court seems to have misapprehended the entire thrust of the State's argument. When explaining at oral argument why Illinois does not recognize the unwed father, counsel for the State presented two basic justifications for the statutory definition of "parents" here at issue. See Tr. of Oral Arg. 25–26. First, counsel noted that in the case of a married couple to whom a legitimate child is born, the two biological parents have already "signified their willingness to work together" in caring for the child by entering into the marriage contract; it is manifestly reasonable, therefore, that both of them be recognized as legal parents with rights and responsibilities in connection with the child. There has been no legally cognizable signification of such willingness on the part of unwed parents, however, and "the male and female . . . may or may not be willing to work together towards the common end of child rearing." To provide legal recognition to both of them as "parents" would often be "to create two conflicting parties competing for legal control of the child."

The second basic justification urged upon us by counsel for the State was that, in order to provide for the child's welfare, "it is

All of those persons in Illinois who may have followed the progress of this case will, I expect, experience no little surprise at the Court's opinion handed down today. Stanley will undoubtedly be surprised to find that he has prevailed on an issue never advanced by him. The judges who dealt with this case in the state courts will be surprised to find their decisions overturned on a ground they never considered. And the legislators and other officials of the State of Illinois, as well as those attorneys of the State who are familiar with the statutory provisions here at issue, will be surprised to learn for the first time that the Illinois Juvenile Court Act establishes a presumption that unwed fathers are unfit. I must confess my own inability to find any such presumption in the Illinois Act. Furthermore, from the record of the proceedings in the Juvenile Court of Cook County in this case, I can only conclude that the judge of that court was unaware of any such presumption, for he clearly indicated that Stanley's asserted fatherhood of the children would stand him in good stead, rather than prejudice him, in any adoption or guardianship proceeding. In short, far from any inti-

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necessary to impose upon at least one of the parties legal responsibility for the welfare of [the child], and since necessarily the female is present at the birth of the child and identifiable as the mother," the State has selected the unwed mother, rather than the unwed father, as the biological parent with that legal responsibility.

It was suggested to counsel during an ensuing colloquy with the bench that identification seemed to present no insuperable problem in Stanley's case and that, although Stanley had expressed an interest in participating in the rearing of the children, "Illinois won't let him." Counsel replied that, on the contrary, "Illinois encourages him to do so if he will accept the legal responsibility for those children by a formal proceeding comparable to the marriage ceremony, in which he is evidencing through a judicial proceeding his desire to accept legal responsibility for the children." Stanley, however, "did not ask for custody. He did not ask for legal responsibility. He only objected to someone [else] having legal control over the children." Tr. of Oral Arg. 38, 39–40.

mations of hostility toward unwed fathers, that court gave Stanley "merit points" for his acknowledgment of paternity and his past assumption of at least marginal responsibility for the children.[2]

In regard to the only issue that I consider properly before the Court, I agree with the State's argument that the Equal Protection Clause is not violated when Illinois gives full recognition only to those father-child relationships that arise in the context of family units bound together by legal obligations arising from marriage or from adoption proceedings. Quite apart from the religious or quasi-religious connotations that marriage has—and has historically enjoyed—for a large proportion of this Nation's citizens, it is in law an essentially contractual relationship, the parties to which have legally enforceable rights and duties, with respect both to each other and to any children born to them. Stanley and the mother of these children never entered such a relationship. The record is silent as to whether they ever privately exchanged such promises as would have bound them in marriage under the common law. See *Cartwright* v. *McGown,* 121 Ill. 388, 398, 12 N. E. 737, 739 (1887). In

[2] The position that Stanley took at the dependency proceeding was not without ambiguity. Shortly after the mother's death, he placed the children in the care of Mr. and Mrs. Ness, who took the children into their home. The record is silent as to whether the Ness household was an approved foster home. Through Stanley's act, then, the Nesses were already the *actual* custodians of the children. At the dependency proceeding, he resisted only the court's designation of the Nesses as the legal custodians; he did not challenge their suitability for that role, nor did he seek for himself either that role or any other role that would have imposed legal responsibility upon him. Had he prevailed, of course, the *status quo* would have obtained: the Nesses would have continued to play the role of actual custodians until either they or Stanley acted to alter the informal arrangement, and there would still have been no living adult with any legally enforceable obligation for the care and support of the infant children.

any event, Illinois has not recognized common-law marriages since 1905. Ill. Rev. Stat., c. 89, § 4. Stanley did not seek the burdens when he could have freely assumed them.

Where there is a valid contract of marriage, the law of Illinois presumes that the husband is the father of any child born to the wife during the marriage; as the father, he has legally enforceable rights and duties with respect to that child. When a child is born to an unmarried woman, Illinois recognizes the readily identifiable mother, but makes no presumption as to the identity of the biological father. It does, however, provide two ways, one voluntary and one involuntary, in which that father may be identified. First, he may marry the mother and acknowledge the child as his own; this has the legal effect of legitimating the child and gaining for the father full recognition as a parent. Ill. Rev. Stat., c. 3, § 12–8. Second, a man may be found to be the biological father of the child pursuant to a paternity suit initiated by the mother; in this case, the child remains illegitimate, but the adjudicated father is made liable for the support of the child until the latter attains age 18 or is legally adopted by another. Ill. Rev. Stat., c. 106¾, § 52.

Stanley argued before the Supreme Court of Illinois that the definition of "parents," set out in Ill. Rev. Stat., c. 37, § 701–14, as including "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, [or] . . . any adoptive parent," [3] violates the Equal Protection Clause in that it

[3] The Court seems at times to ignore this statutory definition of "parents," even though it is precisely that definition itself whose constitutionality has been brought into issue by Stanley. In preparation for finding a purported similarity between this case and *Bell* v. *Burson*, 402 U. S. 535 (1971), the Court quotes the legislatively declared aims of the Juvenile Court Act to "strengthen the minor's family ties whenever possible, removing him from the custody of

treats unwed mothers and unwed fathers differently. Stanley then enlarged upon his equal protection argument when he brought the case here; he argued before this Court that Illinois is not permitted by the Equal Protection Clause to distinguish between unwed fathers and any of the other biological parents included in the statutory definition of legal "parents."

The Illinois Supreme Court correctly held that the State may constitutionally distinguish between unwed fathers and unwed mothers. Here, Illinois' different treatment of the two is part of that State's statutory scheme for protecting the welfare of illegitimate children. In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood.

Furthermore, I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until

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his *parents* only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal." (Emphasis added.) The Court then goes on to find a "self-contradiction" between that stated aim and the Act's nonrecognition of unwed fathers. *Ante,* at 653. There is, of course, no such contradiction. The word "parent" in the statement of legislative purpose obviously has the meaning given to it by the definitional provision of the Act.

they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers. While these, like most generalizations, are not without exceptions, they nevertheless provide a sufficient basis to sustain a statutory classification whose objective is not to penalize unwed parents but to further the welfare of illegitimate children in fulfillment of the State's obligations as *parens patriae*.[4]

Stanley depicts himself as a somewhat unusual unwed father, namely, as one who has always acknowledged and never doubted his fatherhood of these children. He alleges that he loved, cared for, and supported these children from the time of their birth until the death of their mother. He contends that he consequently must be treated the same as a married father of legitimate children. Even assuming the truth of Stanley's allegations, I am unable to construe the Equal Protection Clause as requiring Illinois to tailor its statutory definition of "parents" so meticulously as to include such unusual unwed fathers, while at the same time excluding those unwed, and generally unidentified, biological fathers who in no way share Stanley's professed desires.

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[4] When the marriage between the parents of a legitimate child is dissolved by divorce or separation, the State, of course, normally awards custody of the child to one parent or the other. This is considered necessary for the child's welfare, since the parents are no longer legally bound together. The unmarried parents of an illegitimate child are likewise not legally bound together. Thus, even if Illinois did recognize the parenthood of both the mother and father of an illegitimate child, it would, for consistency with its practice in divorce proceedings, be called upon to award custody to one or the other of them, at least once it had by some means ascertained the identity of the father.

Indeed, the nature of Stanley's own desires is less than absolutely clear from the record in this case. Shortly after the death of the mother, Stanley turned these two children over to the care of a Mr. and Mrs. Ness; he took no action to gain recognition of himself as a father, through adoption, or as a legal custodian, through a guardianship proceeding. Eventually it came to the attention of the State that there was no living adult who had any legally enforceable obligation for the care and support of the children; it was only then that the dependency proceeding here under review took place and that Stanley made himself known to the juvenile court in connection with these two children.[5] Even then, however, Stanley did not ask to be charged with the legal responsibility for the children. He asked only that such legal responsibility be given to no one else. He seemed, in particular, to be concerned with the loss of the welfare payments he would suffer as a result of the designation of others as guardians of the children.

Not only, then, do I see no ground for holding that Illinois' statutory definition of "parents" on its face violates the Equal Protection Clause; I see no ground for holding that any constitutional right of Stanley has been denied in the application of that statutory definition in the case at bar.

As Mr. Justice Frankfurter once observed, "Invalidating legislation is serious business . . . ." *Morey* v. *Doud*, 354 U. S. 457, 474 (1957) (dissenting opinion). The

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[5] As the majority notes, *ante*, at 646, Joan Stanley gave birth to three children during the 18 years Peter Stanley was living "intermittently" with her. At oral argument, we were told by Stanley's counsel that the oldest of these three children had previously been declared a ward of the court pursuant to a neglect proceeding that was "proven against" Stanley at a time, apparently, when the juvenile court officials were under the erroneous impression that Peter and Joan Stanley had been married. Tr. of Oral Arg. 19.

Court today pursues that serious business by expanding its legitimate jurisdiction beyond what I read in 28 U. S. C. § 1257 as the permissible limits contemplated by Congress. In doing so, it invalidates a provision of critical importance to Illinois' carefully drawn statutory system governing family relationships and the welfare of the minor children of the State. And in so invalidating that provision, it ascribes to that statutory system a presumption that is simply not there and embarks on a novel concept of the natural law for unwed fathers that could well have strange boundaries as yet undiscernible.

CARTER ET AL. *v.* STANTON, DIRECTOR, MARION COUNTY DEPARTMENT OF PUBLIC WELFARE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 70–5082. Argued November 8, 1971—Decided April 3, 1972

Appellants' challenge to the Indiana welfare regulation that provides that a person who seeks assistance due to separation or the desertion of a spouse is not entitled to aid until the spouse has been continuously absent for at least six months, unless there are exceptional circumstances of need, was dismissed for failure to exhaust administrative remedies, and alternatively on the grounds of lack of jurisdiction and failure of the pleadings to present a substantial federal question. *Held:* The District Court plainly had jurisdiction, and exhaustion is not required in the circumstances of this case. *Damico* v. *California,* 389 U. S. 416. If that court's characterization of the federal question as insubstantial was based on the face of the complaint, it was error; if the court treated the motion to dismiss as one for summary judgment, its order is unilluminating as to the relevant facts or the applicable law, and was improperly entered.

Vacated and remanded.

Jon D. Noland argued the cause for appellants. With him on the briefs were *John T. Manning* and *David F. Shadel.*

Robert W. Geddes argued the cause for appellee Stanton. With him on the brief were *Harold W. Jones* and *Carl J. Meyer. Mark Peden,* Deputy Attorney General of Indiana, argued the cause for appellee Sterrett. With him on the brief were *Theodore L. Sendak,* Attorney General, *William F. Thompson,* Assistant Attorney General, and *William F. Harvey.*

Solicitor General Griswold and *Richard B. Stone* filed a brief for the United States as *amicus curiae.*

PER CURIAM.

Appellants are women who contend that an Indiana welfare regulation governing eligibility for state and federal aid to dependent children contravenes the Fourteenth Amendment and the Social Security Act, 49 Stat. 627, as amended, 42 U. S. C. § 602 (a)(10). The regulation provides that a person who seeks assistance due to separation or the desertion of a spouse is not entitled to aid until the spouse has been continuously absent for at least six months, unless there are exceptional circumstances of need. Burns Ind. Admin. Rules & Regs. (52–1001)–2 (1967). Appellants brought this action in the United States District Court for the Southern District of Indiana, basing jurisdiction on 42 U. S. C. § 1983 and 28 U. S. C. § 1343, and seeking both declaratory and injunctive relief. A three-judge court was convened pursuant to 28 U. S. C. § 2281. After a "preliminary hearing on defendants' " motion to dismiss "at which the court" received evidence upon which to resolve the matter, the court dismissed the complaint on the ground that none of the claimants had exercised her right under Indiana law to appeal from a county decision denying welfare assistance, Burns Ind. Admin. Rules & Regs. (52–1211)–1 (Supp. 1970), and therefore appellants had failed to exhaust administrative remedies. In the alternative, the court held that the pleadings did not present a substantial federal question and that the court lacked jurisdiction under 42 U. S. C. § 1983 and 28 U. S. C. §§ 2201, 2202. *Carter* v. *Stanton,* No. IP 70–C–124 (SD Ind., Dec. 11, 1970). This direct appeal followed and we noted probable jurisdiction. 402 U. S. 994 (1971).

Contrary to the State's view, our jurisdiction of this

appeal under 28 U. S. C. § 1253 is satisfactorily established. *Sullivan* v. *Alabama State Bar,* 394 U. S. 812, aff'g 295 F. Supp. 1216 (MD Ala. 1969); *Whitney Stores, Inc.* v. *Summerford,* 393 U. S. 9, aff'g 280 F. Supp. 406 (SC 1968). Also, the District Court plainly had jurisdiction of this case pursuant to 42 U. S. C. § 1983 and 28 U. S. C. § 1343. *Damico* v. *California,* 389 U. S. 416 (1967). *Damico,* an indistinguishable case, likewise establishes that exhaustion is not required in circumstances such as those presented here. Cf. *McNeese* v. *Board of Education,* 373 U. S. 668 (1963); *Monroe* v. *Pape,* 365 U. S. 167 (1961).

Finally, if the court's characterization of the federal question presented as insubstantial was based on the face of the complaint, as it seems to have been, it was error. Cf. *Dandridge* v. *Williams,* 397 U. S. 471 (1970); *Shapiro* v. *Thompson,* 394 U. S. 618 (1969); *Damico* v. *California, supra.* But it appears that at the hearing on the motion to dismiss, which was based in part on the asserted failure "to state a claim upon which relief can be granted" (App. 19), matters outside the pleadings were presented and not excluded by the court. The court was therefore required by Rule 12 (b) of the Federal Rules of Civil Procedure to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56. Under Rule 56, summary judgment cannot be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. If this is the course the District Court followed, its order is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim. In this posture of the case, we are unconvinced that summary judgment was properly entered. The judgment of

the District Court is therefore vacated and the case is remanded to that court for proceedings consistent with this opinion.

So ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS.

I agree that both this Court and the District Court have jurisdiction to entertain this case and that the appellants were not required to exhaust administrative remedies before launching their challenge. But, although the District Court should have made more complete findings of fact and conclusions of law, I would not remand simply on this score but would hold that the appellants are entitled to judgment.

The problem is simple and should be disposed of here.

The federal Act defines a "dependent child" as a "needy child . . . who has been deprived of parental support or care by reason of . . . continued absence from the home." [1] Indiana by its Board of Public Welfare has adopted the federal definition of "needy child." [2]

The term "continued absence from the home" is not defined in the federal Act, though HEW recommends "that no period of time be specified as a basis for establishing continued absence as an eligibility factor." [3] Indiana, however, has established by rule a definition of "continued absence" in case of "desertion or separation." In those two instances it makes "continued absence" mean that "the absence shall have been continuous" for at least

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[1] 49 Stat. 629, as amended, 42 U. S. C. § 606 (a).

[2] Ind. State Bd. of Pub. Welfare Reg. 2–400 (a).

[3] Dept. of Health, Education, & Welfare Handbook of Public Assistance Administration, pt. IV, § 3422.5 (1968).

six months,[4] except when the department of welfare finds there are "exceptional circumstances of need."

A dependent child gets aid immediately and continuously in case the parent is incarcerated or in case the parent is inducted into the armed services. The six-month rule creates a separate class of needy children who by the federal standard may be as "needy" as those in the other two categories.

The federal Act directs that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." [5] The federal regulation requires decisions on applications to be made "promptly" and "not in excess of" 30 days and that the assistance check or notification of denial be mailed within that period.[6] As noted, the federal Act contains no waiting period to establish "continued absence." And the HEW Handbook, already referred to,[7] states as respects "continued absence" that "[a] child comes within this interpretation if for any reason his parent is absent." [8]

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[4] Burns, Ind. Admin. Rules & Regs. (52–1001)–2 (1967): "When the continued absence is due to desertion or separation, the absence shall have been continuous for a period of at least six [6] months prior to the date of application for assistance to dependent children; except that under exceptional circumstances of need and where it is determined that the absence of a parent is actual and bona fide an application may be filed and a child may be considered immediately eligible upon a special finding of the county department of public welfare setting forth the facts and reasons for such action."

[5] 42 U. S. C. § 602 (a)(10).

[6] 45 CFR § 206.10 (3), 36 Fed. Reg. 3864.

[7] N. 3, *supra*.

[8] Part IV, § 3422.2, of the Handbook provides:

"Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances:

"1. When the parent is out of the home;

"2. When the nature of the absence is such as either to interrupt

Here, as in *California Human Resources Dept.* v. *Java*, 402 U. S. 121, 135, the State's program "tends to frustrate" the Social Security Act. *King* v. *Smith*, 392 U. S. 309, "establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." *Townsend* v. *Swank*, 404 U. S. 282, 286. While a State has a legitimate interest in preventing fraud, there are, as we said in *Shapiro* v. *Thompson*, 394 U. S. 618, 637, "less drastic means" available "to minimize that hazard." Rather than remanding for a lower court determination of the law of the case, the merits ought to be decided now inasmuch as (a) the facts are essentially undisputed, (b) the appellants' claim based on the federal Act is plainly correct, and (c) further litigation would work a hardship upon welfare recipients affected by the Indiana rule. See generally Note, Individualized Criminal Justice In The Supreme Court: A Study Of Dispositional Decision Making, 81 Harv. L. Rev. 1260 (1968); Bell, Appellate Court Opinions And The Remand Process, 2 Ga. L. Rev. 526, 536 (1968).

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or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and

"3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

"A child comes within this interpretation if for any reason his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left ' me, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return."

The Indiana regulation so plainly collides with the federal Act that I would end this frivolous defense to this welfare litigation by deciding the merits and reversing by reason of the Supremacy Clause.

COLE, STATE HOSPITAL SUPERINTENDENT, ET AL. *v.* RICHARDSON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 70–14. Argued November 16, 1971—Decided April 18, 1972

Appellee's employment at the Boston State Hospital was terminated when she refused to take the following oath required of all public employees in Massachusetts: "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method." Appellee challenged the constitutionality of the oath statute. A three-judge District Court concluded that the attack on the "uphold and defend" clause was foreclosed by *Knight* v. *Board of Regents*, 390 U. S. 36, but found the "oppose the overthrow" clause "fatally vague and unspecific" and thus violative of the First Amendment. In response to a remand from this Court, the District Court concluded that the case was not moot, and reinstated its earlier judgment. *Held:* The Massachusetts oath is constitutionally permissible. Pp. 679–687.

(a) The oath provisions of the United States Constitution, Art. II, § 1, cl. 8, and Art. VI, cl. 3, are not inconsistent with the First Amendment. Pp. 681–682.

(b) The District Court properly held that the "uphold and defend" clause, a paraphrase of the constitutional oath, is permissible. P. 683.

(c) The "oppose the overthrow" clause was not designed to require specific action to be taken in some hypothetical or actual situation but was to assure that those in positions of public trust were willing to commit themselves to live by the constitutional processes of our government. Pp. 683–685.

(d) The oath is not void for vagueness. Perjury, the sole punishment, requires a knowing and willful falsehood, which removes the danger of punishment without fair notice; and there is no problem of punishment inflicted by mere prosecution, as there has been no prosecution under the statute since its enactment nor has any been planned. Pp. 685–686.

(e) There is no constitutionally protected right to overthrow a government by force, violence, or illegal or unconstitutional means, and therefore there is no requirement that one who refuses to take Massachusetts' oath be granted a hearing for the determination of some other fact before being discharged. Pp. 686–687.

Reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, and BLACKMUN, JJ., joined. STEWART and WHITE, JJ., filed a concurring opinion, *post*, p. 687. DOUGLAS, J., filed a dissenting opinion, *post*, p. 687. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 691. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Walter H. Mayo III, Assistant Attorney General of Massachusetts, argued the cause for appellants. With him on the brief was *Robert H. Quinn*, Attorney General.

Stephen H. Oleskey argued the cause for appellee *pro hac vice*. With him on the brief was *Harold Hestnes*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

In this appeal we review the decision of the three-judge District Court holding a Massachusetts loyalty oath unconstitutional.

The appellee, Richardson, was hired as a research sociologist by the Boston State Hospital. Appellant Cole is superintendent of the hospital. Soon after she entered on duty Mrs. Richardson was asked to subscribe to the oath required of all public employees in Massachusetts. The oath is as follows:

> "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States

of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method." [1]

Mrs. Richardson informed the hospital's personnel department that she could not take the oath as ordered because of her belief that it was in violation of the United States Constitution. Approximately 10 days later appellant Cole personally informed Mrs. Richardson that under state law she could not continue as an employee of the Boston State Hospital unless she subscribed to the oath. Again she refused. On November 25, 1968, Mrs. Richardson's employment was terminated and she was paid through that date.

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[1] The full text of the two relevant statutes is as follows:

Mass. Gen. Laws, c. 264, § 14. *Oath or affirmation; form; filing; exemptions*

"Every person entering the employ of the commonwealth or any political subdivision thereof, before entering upon the discharge of his duties, shall take and subscribe to, under the pains and penalty of perjury, the following oath or affirmation:—

"'I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method.'

"Such oath or affirmation shall be filed by the subscriber, if he shall be employed by the state, with the secretary of the commonwealth, if an employee of a county, with the county commissioners, and if an employe of a city or town, with the city clerk or the town clerk, as the case may be.

"The oath or affirmation prescribed by this section shall not be required of any person who is employed by the commonwealth or a political subdivision thereof as a physician or nurse in a hospital or other health care institution and is a citizen of a foreign country."

C. 264, § 15. *Violation of section 14; penalty*

"Violation of section fourteen shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both."

In March 1969 Mrs. Richardson filed a complaint in the United States District Court for the District of Massachusetts. The complaint alleged the unconstitutionality of the statute, sought damages and an injunction against its continued enforcement, and prayed for the convocation of a three-judge court pursuant to 28 U. S. C. §§ 2281 and 2284.

A three-judge District Court held the oath statute unconstitutional and enjoined the appellants from applying the statute to prohibit Mrs. Richardson from working for Boston State Hospital.[2] The District Court found the attack on the "uphold and defend" clause, the first part of the oath, foreclosed by *Knight* v. *Board of Regents*, 269 F. Supp. 339 (SDNY 1967), aff'd, 390 U. S. 36 (1968). But it found that the "oppose the overthrow" clause was "fatally vague and unspecific," and therefore a violation of First Amendment rights. The court granted the requested injunction but denied the claim for damages.

Appeals were then brought to this Court under 28 U. S. C. § 1253. We remanded for consideration of whether the case was moot in light of a suggestion that Mrs. Richardson's job had been filled in the interim. 397 U. S. 238 (1970). On remand, the District Court concluded that Mrs. Richardson's position had not been filled and that the hospital stood ready to hire her for the continuing research project except for the problem of the oath. In an unreported opinion dated July 1, 1970, it concluded that the case was not moot and reinstated its earlier judgment. Appellants again appealed, and we noted probable jurisdiction. 403 U. S. 917 (1971).

We conclude that the Massachusetts oath is constitutionally permissible, and in light of the prolonged liti-

[2] *Richardson* v. *Cole*, 300 F. Supp. 1321 (Mass. 1969).

gation of this case we set forth our reasoning at greater length than previously.

A review of the oath cases in this Court will put the instant oath into context. We have made clear that neither federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments respectively, as for example those relating to political beliefs. *Law Students Research Council* v. *Wadmond*, 401 U. S. 154 (1971); *Baird* v. *State Bar of Arizona*, 401 U. S. 1 (1971); *Connell* v. *Higginbotham*, 403 U. S. 207, 209 (1971) (MARSHALL, J., concurring in result). Nor may employment be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities such as the following: criticizing institutions of government; discussing political doctrine that approves the overthrow of certain forms of government; and supporting candidates for political office. *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961). Employment may not be conditioned on an oath denying past, or abjuring future, associational activities within constitutional protection; such protected activities include membership in organizations having illegal purposes unless one knows of the purpose and shares a specific intent to promote the illegal purpose. *Whitehill* v. *Elkins*, 389 U. S. 54 (1967); *Keyishian* v. *Board of Regents, supra; Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952). Thus, last Term in *Wadmond* the Court sustained inquiry into a bar applicant's associational activities only because it was narrowly confined to organizations that the individual had known to have the purpose of violent overthrow of the government and whose purpose the individual shared. And, finally, an oath may not be so vague that " 'men of common in-

telligence must necessarily guess at its meaning and differ as to its application, [because such an oath] violates the first essential of due process of law.'" *Cramp* v. *Board of Public Instruction,* 368 U. S., at 287. Concern for vagueness in the oath cases has been especially great because uncertainty as to an oath's meaning may deter individuals from engaging in constitutionally protected activity conceivably within the scope of the oath.

An underlying, seldom articulated concern running throughout these cases is that the oaths under consideration often required individuals to reach back into their past to recall minor, sometimes innocent, activities. They put the government into "the censorial business of investigating, scrutinizing, interpreting, and then penalizing or approving the political viewpoints" and past activities of individuals. *Law Students Research Council* v. *Wadmond,* 401 U. S., at 192 (MARSHALL, J., dissenting).

Several cases recently decided by the Court stand out among our oath cases because they have upheld the constitutionality of oaths, addressed to the future, promising constitutional support in broad terms. These cases have begun with a recognition that the Constitution itself prescribes comparable oaths in two articles. Article II, § 1, cl. 8, provides that the President shall swear that he will "faithfully execute the Office . . . and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." Article VI, cl. 3, provides that all state and federal officers shall be bound by an oath "to support this Constitution." The oath taken by attorneys as a condition of admission to the Bar of this Court identically provides in part "that I will support the Constitution of the United States"; it also requires the attorney to state that he will "conduct [himself] uprightly, and according to law."

Bond v. *Floyd*, 385 U. S. 116 (1966), involved Georgia's statutory requirement that state legislators swear to "support the Constitution of this State and of the United States," a paraphrase of the constitutionally required oath. The Court there implicitly concluded that the First Amendment did not undercut the validity of the constitutional oath provisions. Although in theory the First Amendment might have invalidated those provisions, approval of the amendment by the same individuals who had included the oaths in the Constitution suggested strongly that they were consistent. The Court's recognition of this consistency did not involve a departure from its many decisions striking down oaths that infringed First and Fourteenth Amendment rights. The Court read the Georgia oath as calling simply for an acknowledgment of a willingness to abide by "constitutional processes of government." 385 U. S., at 135. Accord, *Knight* v. *Board of Regents*, 390 U. S. 36 (1968) (without opinion). Although disagreeing on other points, in *Wadmond*, *supra*, all members of the Court agreed on this point. MR. JUSTICE MARSHALL noted there, while dissenting as to other points,

> "The oath of constitutional support requires an individual assuming public responsibilities to affirm . . . that he will endeavor to perform his public duties lawfully." 401 U. S., at 192.

The Court has further made clear that an oath need not parrot the exact language of the constitutional oaths to be constitutionally proper. Thus in *Ohlson* v. *Phillips*, 397 U. S. 317 (1970), we sustained the constitutionality of a state requirement that teachers swear to "uphold" the Constitution. The District Court had concluded that the oath was simply a " 'recognition that ours is a government of laws and not of men,' " and that the oath involved an affirmation of "organic law" and rejection of "the use of force to overthrow the govern-

ment." *Ohlson* v. *Phillips,* 304 F. Supp. 1152 (Colo. 1969).

The District Court in the instant case properly recognized that the first clause of the Massachusetts oath, in which the individual swears to "uphold and defend" the Constitutions of the United States and the Commonwealth, is indistinguishable from the oaths this Court has recently approved. Yet the District Court applied a highly literalistic approach to the second clause to strike it down. We view the second clause of the oath as essentially the same as the first.

The second clause of the oath contains a promise to "oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method." The District Court sought to give a dictionary meaning to this language and found "oppose" to raise the specter of vague, undefinable responsibilities actively to combat a potential overthrow of the government. That reading of the oath understandably troubled the court because of what it saw as vagueness in terms of what threats would constitute sufficient danger of overthrow to require the oath giver to actively oppose overthrow, and exactly what actions he would have to take in that respect. Cf. *Ohlson* v. *Phillips,* 304 F. Supp., at 1154 and n. 4.

But such a literal approach to the second clause is inconsistent with the Court's approach to the "support" oaths. One could make a literal argument that "support" involves nebulous, undefined responsibilities for action in some hypothetical situations. As Mr. Justice Harlan noted in his opinion concurring in the result on our earlier consideration of this case,

> "[A]lmost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel. . . . [But such an approach] amounts to

> little more than verbal calisthenics. Cf. S. Chase, The Tyranny of Words (1959); W. Empson, Seven Types of Ambiguity (1955)." *Cole* v. *Richardson*, 397 U. S. 238, 240 (1970).

We have rejected such rigidly literal notions and recognized that the purpose leading legislatures to enact such oaths, just as the purpose leading the Framers of our Constitution to include the two explicit constitutional oaths, was not to create specific responsibilities but to assure that those in positions of public trust were willing to commit themselves to live by the constitutional processes of our system, as MR. JUSTICE MARSHALL suggested in *Wadmond*, 401 U. S., at 192. Here the second clause does not require specific action in some hypothetical or actual situation. Plainly "force, violence or . . . any illegal or unconstitutional method" modifies "overthrow" and does not commit the oath taker to meet force with force. Just as the connotatively active word "support" has been interpreted to mean simply a commitment to abide by our constitutional system, the second clause of this oath is merely oriented to the negative implication of this notion; it is a commitment not to use illegal and constitutionally unprotected force to change the constitutional system. The second clause does not expand the obligation of the first; it simply makes clear the application of the first clause to a particular issue. Such repetition, whether for emphasis or cadence, seems to be the wont of authors of oaths. That the second clause may be redundant is no ground to strike it down; we are not charged with correcting grammar but with enforcing a constitution.

The purpose of the oath is clear on its face. We cannot presume that the Massachusetts Legislature intended by its use of such general terms as "uphold," "defend," and "oppose" to impose obligations of specific, positive action on oath takers. Any such construction would

raise serious questions whether the oath was so vague as to amount to a denial of due process. *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926); *Cramp* v. *Board of Public Instruction*, 368 U. S., at 287.

Nor is the oath as interpreted void for vagueness. As Mr. Justice Harlan pointed out in his opinion on our earlier consideration of this case, the oath is "no more than an amenity." 397 U. S., at 240. It is punishable only by a prosecution for perjury [3] and, since perjury is a knowing and willful falsehood, the constitutional vice of punishment without fair warning cannot occur here. See *American Communications Assn.* v. *Douds*, 339 U. S. 382, 413 (1950). Nor here is there any problem of the punishment inflicted by mere prosecution. See *Cramp* v. *Board of Public Instruction*, 368 U. S., at 284. There has been no prosecution under this statute since its 1948 enactment, and there is no indication that prosecutions have been planned or begun. The oath "triggered no serious possibility of prosecution" by the Commonwealth. *Cole* v. *Richardson*, 397 U. S., at 241. Were we confronted with a record of actual prosecutions or harassment through threatened prosecutions, we might be faced with a different question. Those who view the

[3] The District Court interpreted Mass. Gen. Laws, c. 264, § 15, which punishes a "[v]iolation of section fourteen," see n. 1, *supra*, as "presumably" punishing "a failure to 'live up' to the oath." We see no basis for this interpretation. The clear purpose of § 15 is to punish the failure to comply with the directive aspects of § 14, which requires that every person entering the employ of the Commonwealth subscribe to the oath and file it with a certain state employee. Section 14, which includes the oath, says that it is taken upon the penalty of perjury but mentions nothing about a continuing criminal responsibility to "live up" to it.

The time may come when the value of oaths in routine public employment will be thought not "worth the candle" for all the division of opinion they engender. However, while oaths are required by legislative acts it is not our function to evaluate their wisdom or utility but only to decide whether they offend the Constitution.

Massachusetts oath in terms of an endless "parade of horribles" would do well to bear in mind that many of the hazards of human existence that can be imagined are circumscribed by the classic observation of Mr. Justice Holmes, when confronted with the prophecy of dire consequences of certain judicial action, that it would not occur "while this Court sits." *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 223 (dissenting).

Appellee mounts an additional attack on the Massachusetts oath program in that it does not provide for a hearing prior to the determination not to hire the individual based on the refusal to subscribe to the oath. All of the cases in this Court that require a hearing before discharge for failure to take an oath involved impermissible oaths. In *Slochower* v. *Board of Education,* 350 U. S. 551 (1956) (not an oath case), the State sought to dismiss a professor for claiming the Fifth Amendment privilege in a United States Senate committee hearing; the Court held the State's action invalid because the exercise of the privilege was a constitutional right from which the State could not draw any rational inference of disloyalty. Appellee relies on *Nostrand* v. *Little,* 362 U. S. 474 (1960), and *Connell* v. *Higginbotham,* 403 U. S. 207 (1971), but in those cases the Court held only that the mere refusal to take the particular oath was not a constitutionally permissible basis for termination. In the circumstances of those cases, only by holding a hearing, showing evidence of disloyalty, and allowing the employee an opportunity to respond might the State develop a permissible basis for concluding that the employee was to be discharged.

Since there is no constitutionally protected right to overthrow a government by force, violence, or illegal or unconstitutional means, no constitutional right is infringed by an oath to abide by the constitutional system in the future. Therefore, there is no requirement that

one who refuses to take the Massachusetts oath be granted a hearing for the determination of some other fact before being discharged.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE STEWART and MR. JUSTICE WHITE, concurring.

All agree that the first part of this oath, under which a person swears to "uphold and defend" the Federal and State Constitutions, is wholly valid under the First and Fourteenth Amendments. But if "uphold" and "defend" are not words that suffer from vagueness and overbreadth, then surely neither is the word "oppose" in the second part of the oath.

When the case was here before, Mr. Justice Harlan expressed the view that "[t]his oath does not impinge on conscience or belief, except to the extent that oath taking as such may offend particular individuals." *Cole* v. *Richardson*, 397 U. S. 238, 241 (concurring in result). We agree. And as to such individuals, the Massachusetts law clearly permits an affirmation rather than an oath. Mass. Gen. Laws, c. 264, § 14.

On this basis we join the opinion and judgment of the Court.

MR. JUSTICE DOUGLAS, dissenting.

The part of the oath that says "I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method" is plainly unconstitutional by our decisions. See *Board of Education* v. *Barnette*, 319 U. S. 624, 634.

Advocacy of basic fundamental changes in government, which might popularly be described as "overthrow," is within the protection of the First Amendment even when it is restrictively construed. In *Brandenburg* v. *Ohio*, 395 U. S. 444, a case involving criminal syndicalism, this Court ruled that a State may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. The same idea was put in somewhat different words in *Noto* v. *United States*, 367 U. S. 290, 297–298, that "abstract teaching" of overthrow is protected activity as contrasted to "preparing a group for violent action and steeling it to such action." And see *Yates* v. *United States*, 354 U. S. 298, 318.

The present oath makes such advocacy a possible offense under a restrictive reading of the First Amendment.

The views expressed by Mr. Justice Black and me give the First Amendment a more expansive reading. We have condemned loyalty oaths as "manifestation[s] of a national network of laws aimed at coercing and controlling the minds of men. Test oaths are notorious tools of tyranny. When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people." *Wieman* v. *Updegraff*, 344 U. S. 183, 193 (Black, J., concurring). And see *Speiser* v. *Randall*, 357 U. S. 513, 532 (DOUGLAS, J., concurring). We said in *Brandenburg* that the protection of the First Amendment as applied to the States through the Fourteenth does not depend on the "quality of advocacy," since that "turns on the depth of the conviction." 395 U. S., at 457 (DOUGLAS, J., concurring). The line between the permissible control by a State and the impermissible control is "the line between ideas and overt acts." *Id.*, at 456. "The First Amendment . . . leaves the way wide open for people to favor, discuss, advocate, or incite causes

and doctrines however obnoxious and antagonistic such views may be to the rest of us." *Yates* v. *United States, supra,* at 344 (Black, J., concurring and dissenting). This oath, however, requires that appellee "oppose" that which she has an indisputable right to advocate.[1] Yet the majority concludes that the promise of "opposition"—exacted as a condition of public employment[2]—is a mere redundancy which does not impair appellee's freedom of expression.[3]

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[1] The majority makes the suggestion that "we might be faced with a different question" if there were "a record of actual prosecutions or harassment through threatened prosecutions." *Ante,* at 685. Here, appellee has been discharged from employment and denied her source of livelihood because of her refusal to subscribe to an unconstitutional oath. If the oath suffers from constitutional infirmities, then it matters not whether the penalties imposed for refusing to subscribe to it were criminal or the denial of employment.

[2] The Court is correct when it says "there is no constitutionally protected right to overthrow a government by force, violence, or illegal or unconstitutional means," *ante,* at 686, but that has no bearing on the present case. What is involved here is appellee's right to espouse and advocate ideas which may be unpopular to some. How we can honor that right to advocate while exacting the promise to "oppose," the Court leaves unanswered.

[3] The majority first chides the District Court for taking "a literal approach" and "giv[ing] [the word 'oppose'] a dictionary meaning." The majority then reads "oppose" to be a mere "negative implication of th[e] notion" of "a commitment to abide by our constitutional system" not requiring "specific, positive action." *Ante,* at 683, 684. Having thus emasculated the word, the majority then labels it as "redundant" and a "repetition," *ibid.,* and concludes that the oath, in its entirety, is simply "to abide by the constitutional system in the future." *Ante,* at 686.

If the oath is void for vagueness or overbreadth, it is because the common meaning of its words is so imprecise or so farreaching as to place a "chilling effect" upon constitutionally protected expression. This vice—readily apparent in the present oath—is emphasized rather than avoided by the majority's opinion. The tortured route which the majority takes to give this oath a supposedly constitutional interpretation merely emphasizes the unconstitutional effect those words would have were they to be given their natural meaning.

It is suggested, however, that because only the second portion of the oath is unconstitutional we should sever the two clauses and uphold the first. Even on this assumption, the entire oath must fall. This Court should, of course, base its decisions upon local law where, in so doing, we may avoid deciding federal constitutional questions. Here, we have been cited to no evidence of a legislative intent to separate the two clauses of the oath. This case is thus governed by *Pedlosky* v. *Massachusetts Institute of Technology*, 352 Mass. 127, 224 N. E. 2d 414 (1967), where the Supreme Judicial Court of Massachusetts was confronted with a two-part test oath similar in effect to the one before us.[4] "The substance of the oath [was] not confined merely to a declaration of support of the Federal and State Constitutions. It equally concern[ed] an undertaking by the plaintiff that 'I will faithfully discharge the duties of the position of assistant professor of mathematics according to the best of my ability.'" *Id.*, at 128–129, 224 N. E. 2d, at 416. Finding the oath to be "altogether too vague a standard to enforce judicially" and being without evidence "whether the Legislature would have enacted [it] without the [invalid] provision," the court was unable to hold that the provisions were severable, and thus unanimously struck down the entire oath. *Id.*, at 129, 224 N. E. 2d, at 416.

I would follow the lead of the Supreme Judicial Court of Massachusetts—the court which has the final word on how the statutes of that State are to be construed—and hold that the entire oath must fall.

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[4] The oath provided: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the Commonwealth of Massachusetts, and that I will faithfully discharge the duties of the position of (insert name of position) according to the best of my ability."

I conclude that whether the First Amendment is read restrictively or literally as Jefferson would have read it, the oath which the District Court struck down, 300 F. Supp. 1321, is plainly unconstitutional. I would affirm its judgment.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Appellee was discharged from her job with the Boston State Hospital solely because she refused to swear or affirm the following oath: [1]

> "I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and . . . I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method." Mass. Gen. Laws, c. 264, § 14.

She brought this action in the United States District Court for the District of Massachusetts seeking declaratory and injunctive relief against enforcement of the oath as a condition of her employment.[2] The District Court found that the oath was unconstitutionally vague and granted the relief requested by appellee. The Court now reverses the District Court and sustains the validity

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[1] Appellee was not requested to take the oath before she began her employment. The reasons for the failure of the hospital officials to require the oath as a prerequisite to employment are not readily apparent from the record. In any event, the oath was required of all state employees at all relevant times.

[2] Appellee also sought damages for back wages allegedly owed. It is apparent that all back wages have now been paid. Thus, this claim is no longer in controversy. The District Court rejected appellee's belated attempt to make a claim for loss of wages due to termination, and this decision was well within its discretion under Rule 15 of the Federal Rules of Civil Procedure.

of the oath in its entirety. In my opinion, the second half of the oath is not only vague, but also overbroad. Accordingly, I dissent.

The first half of the oath, requiring an employee to indicate a willingness to "uphold and defend" the state and federal Constitutions, is clearly constitutional. It is nothing more than the traditional oath of support that we have unanimously upheld as a condition of public employment.

It is the second half of the oath to which I object. I find the language "I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method" to be impermissibly vague and overbroad.

It is vague because "men of common intelligence [must] speculate at their peril on its meaning." *Whitehill* v. *Elkins*, 389 U. S. 54, 59 (1967). See also *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 465 (1927); *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939). The most striking problem with the oath is that it is not clear whether the last prepositional phrase modifies the verb "oppose" or the noun "overthrow." Thus, an affiant cannot be certain whether he is swearing that he will "oppose" governmental overthrow by utilizing every means at his disposal, including those specifically prohibited by the laws or constitutions he has sworn to support, or whether he has merely accepted the responsibility of opposing illegal or unconstitutional overthrows. The first reading would almost surely be unconstitutional since it is well established that a State cannot compel a citizen to waive the rights guaranteed him by the Constitution in order to obtain employment. See, *e. g.*, *Pickering* v. *Board of Education*,

391 U. S. 563 (1968); *Garrity* v. *New Jersey*, 385 U. S. 493 (1967). This reading would also make the second half of the oath inconsistent with the first half. It is far from clear to me which reading the Massachusetts Legislature intended. A reasonable man could certainly read the oath either way, and Massachusetts has not offered to make a binding clarification of its purport.

Even assuming that the second reading were unconditionally adopted by the appellants and communicated to prospective employees, the vice of vagueness is still not cured, for the affiant is left with little guidance as to the responsibilities he has assumed in taking the oath. In what form, for example, must he manifest his opposition to an overthrow? At oral argument in the District Court, the Commonwealth's attorney asserted that citizens have three standards of obligation to their government to oppose overthrows:

> "The ordinary citizen who has taken no oath has an obligation to act *in extremis;* a person who has taken the first part of the present oath would have a somewhat larger obligation, and one who has taken the second part has one still larger." 300 F. Supp. 1321, 1322.[3]

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[3] It is clear that both speech and conduct are affected by this portion of the oath. Appellants conceded as much in their brief in the court below:

"[I]n the event that a clear and present danger arose of the actual overthrow of the government, . . . the public employee [would] be required to use reasonable means at his disposal to attempt to thwart that effort. What he might do in such circumstances could range from the use of physical force to *speaking out* against the downfall of the government. The kind of response required would be commensurate with the circumstances and with the employee's ability, his training, and the means available to him at the time." (Emphasis added.) Quoted at 300 F. Supp., at 1322.

The final sentence of this quotation evidences the confusion that

I agree with the conclusion of the District Court that "[t]he very fact that such varied standards . . . can be suggested is enough to condemn the language as hopelessly vague." *Id.*, at 1323.

Vagueness is also inherent in the use of the word "overthrow." When does an affiant's undefined responsibility under the oath require action: When an overthrow is threatened? When an overthrow is likely to be threatened? When a threatened overthrow has some chance of success? Cf. *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969); *Yates* v. *United States*, 354 U. S. 298 (1957); *Dennis* v. *United States*, 341 U. S. 494 (1951). The oath answers none of these questions, and for that reason, if no other, cannot stand.

The importance of clarity and precision in an oath of this kind should not be underestimated. Chapter 264, § 14, of the Massachusetts General Laws provides that the oath is taken subject to the pains and penalties of perjury, and § 15 of that chapter specifies that the pains and penalties may amount to one year in prison and/or a $10,000 fine.

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the State confesses about the responsibilities assumed by employees in taking the oath.

In light of the arguments that the appellants make, I find it impossible to agree with the Court that the second half of the oath adds nothing to the first. The appellants contend, contrary to the assertions of the Court, that a citizen who takes the first part of the oath has more of a duty to his government than one who takes no oath, and that one who takes the second part of the oath has a still greater duty. While the appellants are unsure as to where and how far that duty extends, they never have suggested that it simply does not exist. The argument is even made that the duty extends to the use of physical force.

Were we faced with merely a traditional oath of support, I would join the Court. I share the Court's dismay at having to hold state legislation unconstitutional, but I cannot ignore the thrust that a State would give its statutes. Cf. *Pedlosky* v. *Massachusetts Institute of Technology*, 352 Mass. 127, 224 N. E. 2d 414 (1967).

In concluding that this oath is vague, I rely on *Baggett* v. *Bullitt*, 377 U. S. 360 (1964). One part of the oath considered in *Baggett*, like the Massachusetts oath, required that the affiant assert a willingness to conform future conduct to the criteria set forth in an oath taken under penalty of perjury. The Court struck down the oath in *Baggett*, and MR. JUSTICE WHITE'S opinion for the Court explained in great detail the inordinate difficulties employees would have in attempting to conform their actions to the oath's criteria. *Id.*, at 371. While the oath involved herein differs somewhat from that involved in *Baggett*, the considerations in both cases are the same, and the results should also be the same.

I would also strike down the second half of this oath as an overbroad infringement of protected expression and conduct.

The Court's prior decisions represent a judgment that simple affirmative oaths of support are less suspect and less evil than negative oaths requiring a disaffirmance of political ties, group affiliations, or beliefs. Compare *Connell* v. *Higginbotham*, 403 U. S. 207 (1971); *Knight* v. *Board of Regents*, 269 F. Supp. 339 (SDNY 1967), aff'd, 390 U. S. 36 (1968); *Hosack* v. *Smiley*, 276 F. Supp. 876 (Colo. 1967), aff'd, 390 U. S. 744 (1968); *Ohlson* v. *Phillips*, 304 F. Supp. 1152 (Colo. 1969), aff'd, 397 U. S. 317 (1970), with *Whitehill* v. *Elkins*, 389 U. S. 54 (1967); *Baggett* v. *Bullitt*, *supra*; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Garner* v. *Board of Public Works*, 341 U. S. 716 (1951).

Yet, I think that it is plain that affirmative oaths of loyalty, no less than negative ones, have odious connotations and that they present dangers. See Asper, The Long and Unhappy History of Loyalty Testing in Mary-

land, 13 Am. J. Legal Hist. 97, 104 (1969); Askin, Loyalty Oaths in Retrospect: Freedom and Reality, 1968 Wis. L. Rev. 498, 502; Note, Loyalty Oaths, 77 Yale L. J. 739, 763 (1968). We have tolerated support oaths as applied to all government employees only because we view these affirmations as an expression of "minimal loyalty to the Government." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 415 (1950). Such oaths are merely indications by the employee "in entirely familiar and traditional language, that he will endeavor to perform his public duties lawfully." *Law Students Research Council* v. *Wadmond*, 401 U. S. 154, 192 (MARSHALL, J., dissenting).

It is precisely because these oaths are minimal, requiring only that nominal expression of allegiance "which, by the common law, every citizen was understood to owe his sovereign," *Knight* v. *Board of Regents*, 269 F. Supp., at 341, that they have been sustained. That they are minimal intrusions into the freedom of government officials and employees to think, speak, and act makes them constitutional; it does not mean that greater intrusions will be tolerated. On the contrary, each time this Court has been faced with an attempt by government to make the traditional support oath more comprehensive or demanding, it has struck the oath down. See, *e. g.*, *Connell* v. *Higginbotham*, *supra*; *Baggett* v. *Bullitt*, *supra*; cf. *Bond* v. *Floyd*, 385 U. S. 116 (1966).

When faced with an "imminent clear and present danger," governments may be able to compel citizens to do things that would ordinarily be beyond their authority to mandate. But, such emergency governmental power is a far cry from compelling every state employee in advance of any such danger to promise in any and all circumstances to conform speech and conduct to opposing an "overthrow" of the government. The

Constitution severely circumscribes the power of government to force its citizens to perform symbolic gestures of loyalty. Cf. *Board of Education* v. *Barnette,* 319 U. S. 624 (1943). Since the overbreadth of the oath tends to infringe areas of speech and conduct that may be protected by the Constitution, I believe that it cannot stand. See *Whitehill* v. *Elkins, supra; Baggett* v. *Bullitt, supra; Wieman* v. *Updegraff, supra; Shelton* v. *Tucker,* 364 U. S. 479 (1960).

Because only the second half of the oath is invalid, I would normally favor severing the statute and striking only the second part. See *Connell* v. *Higginbotham, supra.* However, when confronted with an oath strikingly similar to that before us, the Supreme Judicial Court of Massachusetts held that the two portions of the oath were not severable. *Pedlosky* v. *Massachusetts Institute of Technology,* 352 Mass. 127, 224 N. E. 2d 414 (1967). This Court must bow to state courts in their construction of state legislation. Therefore, we must bow to the decision of the state court and strike the oath in its entirety.

Before concluding, I add one additional word about loyalty oaths in general. They have become so prevalent in our country that few Americans have not at one time or another taken an oath to support federal and state governments. Such oaths are not only required as a condition of government employment, but often as a prerequisite to entering military service, to obtaining citizenship, to securing a passport or an educational loan or countless other government offerings. Perhaps we have become so inundated with a variety of these oaths that we tend to ignore the difficult constitutional issues that they present. It is the duty of judges, however, to endeavor to remain sensitive to these issues and not to "encourage the casual taking of oaths by upholding the discharge or exclusion from public employment of

those with a conscientious and scrupulous regard for such undertakings." *Baggett* v. *Bullitt, supra,* at 373–374.

Loyalty oaths do not have a very pleasant history in this country. Whereas they may be developed initially as a means of fostering power and confidence in government, there is a danger that they will swell "into an instrument of thought control and a means of enforcing complete political conformity." Asper, The Long and Unhappy History of Loyalty Testing in Maryland, 13 Am. J. Legal Hist. 97, 108 (1969). Within the limits of the Constitution it is, of course, for the legislators to weigh the utility of the oaths and their potential dangers and to strike a balance. But, as a people, we should always keep in mind the words of Mr. Justice Black, concurring in *Speiser* v. *Randall,* 357 U. S., at 532:

> "Loyalty oaths, as well as other contemporary 'security measures,' tend to stifle all forms of unorthodox or unpopular thinking or expression—the kind of thought and expression which has played such a vital and beneficial role in the history of this Nation. The result is a stultifying conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be. . . . I am certain that loyalty to the United States can never be secured by the endless proliferation of 'loyalty' oaths; loyalty must arise spontaneously from the hearts of people who love their country and respect their government."

Accordingly, I would affirm the decision of the District Court.

GRUBBS, DBA T. R. GRUBBS TIRE & APPLIANCE *v.* GENERAL ELECTRIC CREDIT CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-257. Argued March 23, 1972—Decided April 18, 1972

Respondent, a New York corporation, brought suit for $66,000 on a promissory note against petitioner, a citizen of Texas, in a Texas state court, and petitioner filed a cross-action for $25,000 seeking damages for slander, conversion, and conspiracy in restraint of trade. A later cross-action included the United States, which held a judgment against petitioner, as a party defendant. The action was removed to the Federal District Court for trial of the issues, on petition of the United States. The District Court, without objection, considered all the issues and awarded petitioner a $20,000 judgment against respondent. The Court of Appeals, *sua sponte*, held that the District Court lacked jurisdiction and ordered the case returned to the state court. *Held:* Where after removal a case is tried on the merits without objection and the federal court enters a judgment, the issue on appeal is not whether the case was properly removed, but whether the District Court would have had original jurisdiction if the case had been filed in that court. Here there was diversity jurisdiction in the District Court if the action had been brought there originally. Pp. 702-706.

447 F. 2d 286, reversed and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court.

Bill J. Cornelius argued the cause for petitioner. With him on the brief was *J. R. Cornelius.*

Hubert D. Johnson argued the cause and filed a brief for respondent.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner recovered a money judgment against respondent in the United States District Court for the

Eastern District of Texas, and respondent appealed to the United States Court of Appeals for the Fifth Circuit. That court held the District Court lacked jurisdiction of the case, and reversed the judgment with instructions that the case be remanded to the Texas state court whence it had been removed. This Court granted certiorari, 404 U. S. 983. We have concluded that, whether or not the case was properly removed, the District Court did have jurisdiction of the parties at the time it entered judgment. Under such circumstances the validity of the removal procedure followed may not be raised for the first time on appeal, and we accordingly reverse the judgment of the Court of Appeals.

In September 1964 respondent General Electric Credit Corp. (GECC) commenced a lawsuit against petitioner Grubbs by the filing of a petition in the Texas state trial court. The petition sought recovery upon a promissory note claimed to have been previously executed by petitioner to GECC in the principal sum of some $66,000. Two years later, petitioner Grubbs filed an amended answer and "cross-action," seeking damages from respondent and from the General Electric Co. (GE) by reason of alleged slander, conversion, and conspiracy in restraint of trade.[1] GE appeared in the state court in answer to petitioner's cross-action against it, and respondent likewise filed an answer.

The following year, petitioner filed a second amended answer and cross-actions, one of which included the United States as an added party defendant. The basis asserted by petitioner for naming the United States as a party was the fact that the latter held an out-

[1] The business relationship of the parties was as follows. Grubbs was a franchised dealer for GE. GECC provided financing for customers of Grubbs who purchased GE products.

standing judgment against petitioner, as did several of his other creditors, and petitioner prayed the state court to determine priorities among the judgment liens. Responding to the gathering momentum of this long-dormant lawsuit, the United States then filed in the United States District Court for the Eastern District of Texas a petition for removal of the action to that court "for trial and determination upon the merits of all issues or claims therein, as is provided by Title 28, Section[s] 1444, 1441 (c) and 1446."

All of the parties treated the effect of the removal petition as placing before the District Court not only the claim by petitioner against the United States for adjudication of lien priorities, but also respondent's claim against petitioner on the promissory note and petitioner's claim for damages against respondent based on conspiracy to restrain trade and tortious interference with business relations.

At no time following the filing of the removal petition by the United States did respondent, by motion to remand or otherwise, object to the District Court's taking jurisdiction of the entire "action." In that court, the United States answered petitioner's cross-action and filed its own "cross-action" against respondent and GE, asserting that the latter two had maliciously interfered with the contractual relationship between petitioner and the United States, and seeking damages as a result of this alleged wrong.

The case was ultimately tried to the District Court without a jury. That court held against respondent on its promissory-note claim, held in favor of petitioner on his claim against respondent for tortious interference, and awarded $20,000 damages thereon, and dismissed the claims of petitioner and the United States against GE and the claim of the United States against respondent. The court further found that it was unable to

determine the priority of liens as between the various parties. Judgment was accordingly entered in favor of petitioner Grubbs and against respondent GECC in the amount of $20,000, and providing that the remaining parties take nothing by their actions.

GECC appealed to the Court of Appeals, which on its own motion questioned the jurisdiction of the District Court. After calling for supplemental briefs on the issue, the Court of Appeals decided that the only conceivable basis for jurisdiction of the action in the District Court was the removal by the United States purportedly in accordance with 28 U. S. C. § 1444. That court held, however, that petitioner's "interpleader" of the United States and other parties for a determination of priority of judgment liens was a spurious basis for joining the United States as a party defendant under 28 U. S. C. § 2410. Therefore, in the view of that court, the provisions of 28 U. S. C. § 1444, authorizing removal by the United States of an action brought under 28 U. S. C. § 2410, were not available to the Government. Concluding, thus, that the removal had not been authorized by statute, the Court of Appeals decided that there was no other basis for the District Court's jurisdiction of the action, and that the case should be remanded to the state court in which it had originated.

Longstanding decisions of this Court make clear, however, that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court. In *Baggs* v. *Martin*, 179 U. S. 206 (1900), a receiver appointed by a federal court was sued in state court and removed the action to the federal court that

appointed him. Following judgment on the merits, the receiver sought reversal of the judgment on the ground that the case was not properly removable from the state court. Since the federal court that had earlier appointed the receiver would have had original jurisdiction of an action against him, this Court held that he could not then object to the removal of the case when removal had come as a result of his own action.

Mackay v. *Uinta Development Co.*, 229 U. S. 173 (1913), dealt with an action that had been commenced in the Wyoming state court between two citizens of different States. Plaintiff's claim was for less than the jurisdictional amount, but defendant's counterclaim exceeded the jurisdictional amount. The case was removed to federal court without objection by either party, and there tried on the merits. When the losing party later sought to upset a judgment against him on the merits because of failure to comply with the removal statutes, this Court rejected the claim, saying:

> "[R]egardless of the manner in which the case was brought or how the attendance of the parties in the United States court was secured, there was presented to the Circuit Court a controversy between citizens of different States in which the amount claimed by one non-resident was more than $2,000, exclusive of interest and costs. As the court had jurisdiction of the subject-matter the parties could have been realigned by making Mackay plaintiff and the Development Company defendant, if that had been found proper. But if there was any irregularity in docketing the case or in the order of the pleadings such an irregularity was waivable and neither it nor the method of getting the parties before the court operated to deprive it of the power to determine the cause." *Id.*, at 176–177.

Applying this doctrine to the case before us, we note that the parties concede in their briefs that petitioner is a citizen of Texas, and that respondent and GE are citizens of New York for purposes of diversity jurisdiction. This concession is supported by excerpts from discovery proceedings included in the record. Respondent GECC in its pleading initiating the action in the state trial court sought recovery of $66,000 from petitioner Grubbs; Grubbs in his state court cross-action sought recovery of $25,000 from respondent. There was thus diversity jurisdiction in the Federal District Court under 28 U. S. C. § 1332 if the action had been brought in that court originally.

In *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6 (1951), this Court held that the rule enunciated in *Baggs* v. *Martin*, *supra*, had no application to a case where at the time of judgment citizens of the same State were on both sides of the litigation. There the state court plaintiff had joined two insurance carriers and their local agent in an action to recover for a fire loss. *Finn* held that the dispute between the plaintiff and the insurance carriers was not a "separate and independent claim or cause of action" under 28 U. S. C. § 1441 (c), and that therefore removal of the action to a federal court by one of the carriers was unauthorized by statute. Since complete diversity did not obtain even as of the date of judgment, and since there was no other basis for federal jurisdiction, this Court reversed the judgment of the Court of Appeals, which had held the case properly removable.

In this case there were, of course, parties other than petitioner, respondent, and GE, both at the time of removal and at the time of judgment. Indeed, the case might be said to abound in parties. Petitioner in his "cross-action" against the United States for determination of lien priorities asserted a claim against an addi-

tional party that had virtually no relationship to the claim or relief sought by petitioner against respondent, or that sought by respondent against petitioner.[2]

While, of course, Texas is free to establish such rules of practice for her own courts as she chooses, the removal statutes and decisions of this Court are intended to have uniform nationwide application. "Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts." *Shamrock Oil Corp.* v. *Sheets,* 313 U. S. 100, 104 (1941). The rule enunciated in *Baggs* v. *Martin, supra, Mackay* v. *Uinta Development Co., supra,* and *American Fire & Casualty Co.* v. *Finn, supra,* likewise lays down a doctrine that is intended to have uniform nationwide application. However many parties, cross-claims, or indeed lawsuits Texas practice may permit to be joined in one "case" or one "action," the requirement of *Finn* was applied in the context of a two-sided lawsuit. We conclude that the requirement that jurisdiction exist at the time of judgment, stated in that case, is satisfied here where the District Court had jurisdiction to render judgment as between the plaintiff-counter-defendant, the defendant-counterclaimant, and the additional counter-defendant. It would serve no

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[2] Petitioner's state court cross-action against the United States was by its terms based on "Rule 22 of the U. S. Rules of Civil Procedure." However, under Fed. Rule Civ. Proc. 22, a defendant seeking interpleader must frame his pleading either as a cross-claim seeking relief against a co-party already in the lawsuit, or as a counterclaim seeking relief against the plaintiff. If the defendant states a claim seeking relief against such a co-party or plaintiff-counter-defendant, he may seek to bring in additional parties under the joinder provisions of Rule 20. But the interpleader provided by Rule 22 must have some nexus with a party already in the case. As noted above, petitioner's interpleader claim sought no relief against any other party in the action.

purpose to require that in order to sustain jurisdiction in such a case, the prevailing party in the original two-sided litigation must go further and show that there was likewise jurisdiction as to virtually unrelated claims that the state court had permitted to be joined in the same lawsuit.

Finding that the necessary jurisdiction did exist, we reverse the judgment of the Court of Appeals and remand the case to that court for consideration of respondent's appeal on the merits.

Reversed and remanded.

Syllabus

EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT ET AL. *v.* DELTA AIRLINES, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF INDIANA

No. 70–99. Argued February 23–24, 1972—Decided April 19, 1972*

In No. 70–99 respondents challenged a "use and service charge" of $1 "for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport" in Evansville, Indiana. The funds were to be used for the improvement and maintenance of the airport. The Indiana Supreme Court, upholding the lower court, held the charge to be an unreasonable burden on interstate commerce in violation of Art. I, § 8, of the Constitution. In No. 70–212 a New Hampshire statute levied a service charge of $1 for each passenger enplaning a scheduled commercial airliner weighing 12,500 pounds or more, and a 50¢ charge for each passenger enplaning a scheduled aircraft weighing less than 12,500 pounds. Fifty percent of the funds were allocated to the State's aeronautical fund, with the balance going to the municipalities or airport authorities owning the public landing areas. The New Hampshire Supreme Court sustained the constitutionality of the statute. *Held:* The charges imposed in these cases are constitutional. Pp. 711–722.

(a) A charge designed to make the user of state-provided facilities pay a reasonable fee for their construction and maintenance may constitutionally be imposed on interstate and intrastate users alike. *Crandall* v. *Nevada*, 6 Wall. 35, distinguished. Pp. 711–717.

(b) The charges, applicable to both interstate and intrastate flights, do not discriminate against interstate commerce and travel. P. 717.

(c) Although not all users of the airport facilities are subject to the fees, and there are distinctions among different classes of passengers and aircraft, the charges reflect a fair, albeit imperfect,

*Together with No. 70–212, *Northeast Airlines, Inc., et al.* v. *New Hampshire Aeronautics Commission et al.*, on appeal from the Supreme Court of New Hampshire, argued February 24, 1972.

approximation of the use of the facilities by those for whose benefit they are imposed, and the exemptions are not wholly unreasonable. Pp. 717–719.

(d) The airlines have not shown the charges to be excessive in relation to the costs incurred by the taxing authorities in constructing and maintaining airports with public funds. New Hampshire's decision to reimburse local expenditures through unrestricted revenues is not a matter of concern to the airlines. Pp. 719–720.

(e) The charges do not conflict with any federal policies furthering uniform national regulation of air transportation. Pp. 720–721.

(f) There is no suggestion here that the charges do not advance the constitutionally permissible objective of having interstate commerce bear a fair share of airport costs. P. 722.

No. 70–99, — Ind. —, 265 N. E. 2d 27, reversed; No. 70–212, 111 N. H. 5, 273 A. 2d 676, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 722. POWELL, J., took no part in the consideration or decision of the cases.

Howard P. Trockman argued the cause for petitioners in No. 70–99. With him on the briefs was *James F. Flynn*. *John K. Mallory, Jr.*, argued the cause for respondents in No. 70–99 and for appellants in No. 70–212. With him on the brief in No. 70–99 were *Fred P. Bamberger, J. Eugene Marans,* and *Jeffrey R. Kinney*. With him on the brief in No. 70–212 were *Joseph A. Millimet* and *Mr. Marans*. *W. Michael Dunn,* Assistant Attorney General of New Hampshire, argued the cause for appellees in No. 70–212. With him on the brief was *Warren B. Rudman,* Attorney General.

Donald G. Alexander filed a brief for the National League of Cities as *amicus curiae* urging reversal in No. 70–99.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question is whether a charge by a State or municipality of $1 per commercial airline passenger to help defray the costs of airport construction and maintenance violates the Federal Constitution. Our answer is that, as imposed in these two cases, the charge does not violate the Federal Constitution.

No. 70–99. Evansville-Vanderburgh Airport Authority District was created by the Indiana Legislature to operate Dress Memorial Airport in Evansville, Indiana. Under its authority to enact ordinances adopting rates and charges to be collected from users of the airport facilities and services, the Airport Authority enacted Ordinance No. 33 establishing "a use and service charge of One Dollar ($1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport." The commercial airlines are required to collect and remit the charge, less 6% allowed to cover the airlines' administrative costs in doing so. The moneys collected are held by the Airport Authority "in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof."

Respondents challenged the constitutionality of the charge in an action filed in the Superior Court of Vanderburgh County, Indiana. The court held that the charge constituted an unreasonable burden on interstate commerce in violation of Art. I, § 8, of the Federal Constitution and permanently enjoined enforcement of the ordinance. The Indiana Supreme Court affirmed, — Ind. —, 265 N. E. 2d 27 (1970). We granted certiorari, 404 U. S. 820 (1971). We reverse.

No. 70–212. Chapter 391 of the 1969 Laws of New Hampshire, amending N. H. Rev. Stat. Ann. §§ 422:3, 422:43, 422:45, requires every interstate and intrastate "common carrier of passengers for hire by aircraft on a regular schedule" that uses any of New Hampshire's five publicly owned and operated airports to "pay a service charge of one dollar with respect to each passenger emplaning [1] upon its aircraft with a gross weight of 12,500 pounds or more, or a service charge of fifty cents with respect to each passenger emplaning upon its aircraft with a gross weight of less than 12,500 pounds." Fifty percent of the moneys collected are allocated to the State's aeronautical fund and 50% "to the municipalities or the airport authorities owning the public landing areas at which the fees . . . were imposed." The airlines are authorized to pass on the charge to the passenger.[2]

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[1] "Emplane" is a variant of "enplane." Webster's Third New International Dictionary 743 (1961).

[2] Before the enactment of Chapter 391, N. H. Rev. Stat. Ann. § 422:43 levied a $1 service charge for each passenger boarding a scheduled airline at an airport receiving development funds from a certain state bond issue authorized in 1957. Section 422:44 imposed a similar fee for nonscheduled commercial planes. No fee was imposed for any noncommercial aircraft or for commercial aircraft weighing less than 12,500 pounds. All of the fees collected were to be used to pay off the 1957 bond issue, and the charge was to cease once repayment was completed. N. H. Rev. Stat. Ann. § 422:45.

Chapter 391 broadened the applicability of the fee for *scheduled* airlines to all airports that had received state or local public funds since 1959, and as to these airlines eliminated the provisions terminating the fee upon repayment of the 1957 bond issue. The Act also imposed the 50¢ service charge for boarding of small aircraft (under 12,500 pounds) operated by scheduled airlines, but retained the small-plane exemption for nonscheduled airlines.

Chapter 140 of the New Hampshire Laws of 1971, enacted after the State Supreme Court decision involved here, expanded the charge imposed on *nonscheduled* airlines by including all airports receiving state or local funds after 1959. The legislature did not

Appellants brought this action in the Superior Court of Merrimack County, New Hampshire, and challenged the constitutionality of the charge as to scheduled commercial flights on the grounds of repugnancy to the Commerce Clause, the Equal Protection Clause of the Fourteenth Amendment, and the provisions of the Federal Constitution protecting the right to travel. The Superior Court, without decision, transferred the action to the New Hampshire Supreme Court, and that court sustained the constitutionality of the statute. 111 N. H. 5, 273 A. 2d 676 (1971). We noted probable jurisdiction, 404 U. S. 819 (1971).[3] We affirm.

We begin our analysis with consideration of the contention of the commercial airlines in both cases that the charge is constitutionally invalid under the Court's decision in *Crandall* v. *Nevada*, 6 Wall. 35 (1868). There the Court invalidated a Nevada statute that levied a "tax of one dollar upon every person leaving the State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire." The Court approached the problem as one of whether levy of "any tax of that character," whatever its amount, impermissibly burdened the constitutionally protected right of citizens to travel. In holding that it did, the Court reasoned:

> "[I]f the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State

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eliminate the bond-repayment cut-off, as it had for scheduled airlines, nor did it apply the 50¢ fee to light aircraft operated by nonscheduled airlines.

[3] Courts in Montana and New Jersey have invalidated airport fees similar to those involved here. *Northwest Airlines, Inc.* v. *Joint City-County Airport Bd.*, 154 Mont. 352, 463 P. 2d 470 (1970); *Allegheny Airlines, Inc.* v. *Sills*, 110 N. J. Super. 54, 264 A. 2d 268 (1970). In addition, several legislative proposals for similar taxes have been abandoned on the basis of opinions by state or local officials arguing their invalidity.

> can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other." *Id.*, at 46.[4]

The Nevada charge, however, was not limited, as are the Indiana and New Hampshire charges before us, to travelers asked to bear a fair share of the costs of providing public facilities that further travel. The Nevada tax applied to passengers traveling interstate by privately owned transportation, such as railroads. Thus the tax was charged without regard to whether Nevada provided any facilities for the passengers required to pay the tax. Cases decided since *Crandall* have distinguished it on that ground and have sustained taxes "designed to make [interstate] commerce bear a fair share of the cost of the local government whose protection it enjoys." *Freeman* v. *Hewit*, 329 U. S. 249, 253 (1946).[5] For example, in *Hendrick* v. *Maryland*, 235 U. S. 610 (1915), a District of Columbia resident was convicted of driving in Maryland without paying a fee charged to help defray the costs of road construction and repair. He challenged his conviction on the ground that the fee burdened interstate commerce in violation of the rights of citizens to travel into and through the State. The Court rejected that argument, holding that:

> "[W]here a State at its own expense furnishes special facilities for the use of those engaged in com-

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[4] Concurring Justices invalidated the tax as repugnant to the Commerce Clause. 6 Wall., at 49.

[5] The State's jurisdiction to tax is, however, limited by the due process requirement that the "taxing power exerted by the state [bear] fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940).

merce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce. *Transportation Co.* v. *Parkersburg,* 107 U. S. 691, 699; *Huse* v. *Glover,* 119 U. S. 543, 548, 549; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 329, 330; *Minnesota Rate Cases,* 230 U. S. 352, 405; and authorities cited. The action of the State must be treated as correct unless the contrary is made to appear. In the instant case there is no evidence concerning the value of the facilities supplied by the State, the cost of maintaining them, or the fairness of the methods adopted for collecting the charges imposed; and we cannot say from a mere inspection of the statute that its provisions are arbitrary or unreasonable." *Id.,* at 624.

The Court expressly distinguished *Crandall,* saying:

"There is no solid foundation for the claim that the statute directly interferes with the rights of citizens of the United States to pass through the State, and is consequently bad according to the doctrine announced in *Crandall* v. *Nevada,* 6 Wall. 35. In that case a direct tax was laid upon the passenger for the privilege of leaving the State; while here the statute at most attempts to regulate the operation of dangerous machines on the highways and to charge for the use of valuable facilities." *Ibid.*[6]

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[6] This distinction has been drawn in other cases. For example, in striking down a state tax construed as falling "upon the privilege of carrying on a business that was *exclusively* interstate in character," *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602,

We therefore regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike. The principle that burdens on the right to travel are constitutional only if shown to be necessary to promote a compelling state interest has no application in this context. See *Shapiro* v. *Thompson,* 394 U. S. 618 (1969). The facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense.

The Indiana and New Hampshire Supreme Courts differed in appraising their respective charges in terms of whether the charge was for the use of facilities in aid of travel provided by the public. The Indiana Supreme Court held that the Evansville charge "is not reasonably related to the use of the facilities which benefit from the tax . . . ." — Ind., at —, 265 N. E. 2d, at 31. The New Hampshire Supreme Court, on the other hand, held that the New Hampshire charge was a "fee for the use of facilities furnished by the public" that did not "exceed reasonable compensation for the use provided." 111 N. H., at 9, 273 A. 2d, at 678, 679.

In addressing the question, we do not think it particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it chooses. In either case, it is the act of enplanement and the consequent use of runways and other airport facilities that give rise to the obligation. Our inquiry

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609 (1951) (emphasis in original), the Court expressly distinguished it from a tax "levied as compensation for the use of highways." *Id.,* at 607.

is whether the use of airport facilities occasioned by enplanement is a permissible incident on which to levy these fees, regardless of whether the airline or its passengers bear the formal responsibility for their payment.

Our decisions concerning highway tolls are instructive. They establish that the States are empowered to develop "uniform, fair and practical" standards for this type of fee. While the Court has invalidated as wholly unrelated to road use a toll based on the carrier's seating capacity, *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183 (1931); *Sprout* v. *South Bend,* 277 U. S. 163 (1928), and the amount of gasoline over 20 gallons in the carrier's gas tank, *McCarroll* v. *Dixie Greyhound Lines, Inc.,* 309 U. S. 176 (1940), we have sustained numerous tolls based on a variety of measures of actual use, including: horsepower, *Hendrick* v. *Maryland, supra; Kane* v. *New Jersey,* 242 U. S. 160 (1916); number and capacity of vehicles, *Clark* v. *Poor,* 274 U. S. 554 (1927); mileage within the State, *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245 (1928); gross-ton mileage, *Continental Baking Co.* v. *Woodring,* 286 U. S. 352 (1932); carrying capacity, *Hicklin* v. *Coney,* 290 U. S. 169 (1933); and manufacturer's rated capacity and weight of trailers, *Dixie Ohio Express Co.* v. *State Revenue Comm'n,* 306 U. S. 72 (1939).

We have also held that a State may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive. *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n,* 295 U. S. 285 (1935); *Morf* v. *Bingaman,* 298 U. S. 407 (1936); *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U. S. 495 (1947). And in *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542 (1950), the Court sustained a Maryland highway toll of "2% upon the fair market value

of motor vehicles used in interstate commerce." That toll was supplemental to a standard mileage charge imposed by the State, so that "the total charge as among carriers [did] vary substantially with the mileage traveled." *Id.*, at 546. It was there argued, however, that the correlation between tax and use was not precise enough to sustain the toll as a valid user charge. Noting that the tax "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted," *id.*, at 545, the Court rejected the argument:

> "Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision.' *Harvester Co.* v. *Evatt*, 329 U. S. 416, 422–423. Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers. *Aero Transit Co.* v. *Georgia Comm'n*, 295 U. S. 285, 289. Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads." *Id.*, at 546–547.

Thus, while state or local tolls must reflect a "uniform, fair and practical standard" relating to public expenditures, it is the amount of the tax, not its formula, that is of central concern. At least so long as the toll is based on some fair approximation of use or privilege

for use, as was that before us in *Capitol Greyhound*, and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users.

The Indiana and New Hampshire charges meet those standards. *First*, neither fee discriminates against interstate commerce and travel. While the vast majority of passengers who board flights at the airports involved are traveling interstate, both interstate and intrastate flights are subject to the same charges. Furthermore, there is no showing of any inherent difference between these two classes of flights, such that the application of the same fee to both would amount to discrimination against one or the other. See *Nippert* v. *Richmond*, 327 U. S. 416 (1946).

Second, these charges reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed. We recognize that in imposing a fee on the boarding of commercial flights, both the Indiana and New Hampshire measures exempt in whole or part a majority of the actual number of persons who use facilities of the airports involved. Their number includes certain classes of passengers, such as active members of the military and temporary layovers,[7] deplaning commercial passengers,[8] and passengers on noncommercial flights,[9] nonscheduled commercial flights,[10] and commer-

[7] Active members of the military and temporary layovers are not subject to the Indiana tax. The New Hampshire statute on its face does not distinguish these classes of passengers.

[8] Deplaning passengers are not subject to either tax.

[9] Private aviators are not subject to either tax.

[10] New Hampshire imposes a fee of $1 for nonscheduled flights on aircraft weighing more than 12,500 pounds, but no fee for nonscheduled flights on lighter planes; the $1 fee lapses upon repay-

cial flights on light aircraft.[11] Also exempt are nonpassenger users, such as persons delivering or receiving air-freight shipments, meeting or seeing off passengers, dining at airport restaurants, and working for employers located on airport grounds. Nevertheless, these exceptions are not wholly unreasonable. Certainly passengers as a class may be distinguished from other airport users, if only because the boarding of flights requires the use of runways and navigational facilities not occasioned by nonflight activities. Furthermore, business users, like shops, restaurants, and private parking concessions, do contribute to airport upkeep through rent, a cost that is passed on in part at least to their patrons. And since the visitor who merely sees off or meets a passenger confers a benefit on the passenger himself, his use of the terminal may reasonably be considered to be included in the passenger's fee.

The measures before us also reflect rational distinctions among different classes of passengers and aircraft. Commercial air traffic requires more elaborate navigation and terminal facilities, as well as longer and more costly runway systems, than do flights by smaller private planes.[12] Commercial aviation, therefore, may be made

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ment of a bond issue authorized in 1957. See n. 2, *supra*. The Indiana ordinance on its face does not distinguish between scheduled and nonscheduled commercial flights.

[11] New Hampshire imposes a 50¢ fee for commercial flights on light aircraft if scheduled, and no fee if unscheduled. The Indiana ordinance on its face does not distinguish light from heavy aircraft.

[12] The parties in No. 70–99, for example, have stipulated that "[m]ost of the facilities constituting the Terminal Building at Dress Memorial Airport would not be essential for the operation of a noncommercial airport except for the required use thereof by persons traveling on commercial airlines," that "runway lengths, approach areas, taxiways and ramp areas of said Dress Memorial Airport would not be so extensive except for the requirement that the same be sufficiently extensive in order to accommodate commercial airline

to bear a larger share of the cost of facilities built primarily to meet its special needs, whether that additional charge is levied on a per-flight basis in the form of higher takeoff and landing fees, or as a toll per passenger-use in the form of a boarding fee. In short, distinctions based on aircraft weight or commercial versus private use do not render these charges wholly irrational as a measure of the relative use of the facilities for whose benefit they are levied. Nor does the fact that they are levied on the enplanement of commercial flights, but not deplanement. It is not unreasonable to presume that passengers enplaning at an airport also deplane at the same airport approximately the same number of times. The parties in No. 70–99, for example, have stipulated that the number of passengers enplaning and deplaning at Dress Memorial Airport in 1967 was virtually the same. Thus, a fee levied only on the boarding of commercial aircraft can reasonably be supposed to cover a charge on use by passengers when they deplane.[13]

Third, the airlines have not shown these fees to be excessive in relation to costs incurred by the taxing authorities. The record in No. 70–99 shows that in

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carriers and their passengers," and that "Dress Memorial Airport operates and maintains an instrument lighting system and an approach lighting system for use by commercial airlines, both of which are costly to maintain and operate and would not be necessary in connection with use by private, noncommercial aircraft." App. 54, 55.

[13] Because they do reflect a rational measure of relative use, these exceptions and exemptions are also consistent with the requirement of the Equal Protection Clause, that "in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' *Baxstrom* v. *Herold,* 383 U. S. 107, 111; *Carrington* v. *Rash,* 380 U. S. 89, 93; *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415." *Rinaldi* v. *Yeager,* 384 U. S. 305, 309 (1966).

1965 the Evansville-Vanderburgh Airport Authority paid bond retirement costs of $166,000 for capital improvements at Dress Memorial Airport, but recovered only $9,700 of these costs in the form of airport revenue. The airport's revenues covered only $63,000 of the Authority's $184,000 bond costs in 1966, $87,000 of $182,000 in 1967, and $65,000 of $178,000 in 1968. The respondents in No. 70–99 have advanced no evidence that a $1 boarding fee, if permitted to go into effect, would do more than meet these past, as well as current, deficits. Appellants in No. 70–212 have likewise failed to offer proof of excessiveness.

This omission in No. 70–212 suffices to dispose of the final attack by appellants in that case on the New Hampshire statute. Appellants argue that the statute "on its face belies any legislative intent to impose an exaction based solely on use" because only 50% of its revenue is allocated to the state aeronautical fund while "the remaining fifty per cent is allocated to the municipalities or airport authorities owning the landing areas at which the fees were imposed in the form of unrestricted general revenues." Brief 51–52. Yet so long as the funds received by local authorities under the statute are not shown to exceed their airport costs, it is immaterial whether those funds are expressly earmarked for airport use. The State's choice to reimburse local expenditures through unrestricted rather than restricted revenues is not a matter of concern to these appellants. See *Clark* v. *Poor*, 274 U. S., at 557; *Morf* v. *Bingaman*, 298 U. S., at 412; *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S., at 502–505.

We conclude, therefore, that the provisions before us impose valid charges on the use of airport facilities constructed and maintained with public funds. Furthermore, we do not think that they conflict with any federal policies furthering uniform national regulation

of air transportation. No federal statute or specific congressional action or declaration evidences a congressional purpose to deny or pre-empt state and local power to levy charges designed to help defray the costs of airport construction and maintenance. A contrary purpose is evident in the Airport and Airway Development Act of 1970, 84 Stat. 219, 49 U. S. C. § 1701 *et seq.* That Act provides that as "a condition precedent to his approval of an airport development project," the Secretary of Transportation must determine that

> "the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection." 49 U. S. C. § 1718 (8).

The commercial airlines argue in these cases that a proliferation of these charges in airports over the country will eventually follow in the wake of a decision sustaining the validity of the Indiana and New Hampshire fees, and that this is itself sufficient reason to adjudge the charges repugnant to the Commerce Clause. "If such levies were imposed by each airport along a traveller's route, the total effect on the cost of air transportation could be prohibitive, the competitive structure of air carriers could be affected, and air transportation, compared to other forms of transportation, could be seriously impaired." Brief for Appellants in No. 70–212, p. 44. The argument relies on *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959). There the Court invalidated an Illinois statute requiring that trucks and trailers using Illinois highways be equipped at the state line with a contour mudguard of specified design.

The lower courts had found that the contour mudguard possessed no advantages in terms of safety over the conventional flap permitted in all other States and indeed created safety hazards. But there is no suggestion that the Indiana and New Hampshire charges do not in fact advance the constitutionally permissible objective of having interstate commerce bear a fair share of the costs to the States of airports constructed and maintained for the purpose of aiding interstate air travel. In that circumstance, "[a]t least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State[s]." *Freeman* v. *Hewit*, 329 U. S., at 253; see also *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 775–776 (1945).

The judgment in No. 70–99 is reversed; the judgment in No. 70–212 is affirmed.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

MR. JUSTICE DOUGLAS, dissenting.

These cases are governed by *Crandall* v. *Nevada*, 6 Wall. 35, which must be overruled if we are to sustain the instant taxes.

One case involves an Indiana tax of $1 on every enplaning commercial airline passenger at the Evansville Airport. The other involves a New Hampshire $1 tax on every passenger enplaning a scheduled commercial aircraft with a gross weight of 12,500 pounds or more and a 50¢ tax on every passenger enplaning such aircraft with a gross weight of less than 12,500 pounds.

The carriers are made responsible for paying, accounting for, and remitting the fee to the local authority.

Crandall v. *Nevada*, decided before the Fourteenth Amendment, struck down a state law which levied a

$1 tax on every person leaving the State by rail, stage coach, or other common carrier. Mr. Justice Miller, speaking for the Court, said the citizen had rights which the tax abridged:

> "He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." *Id.*, at 44.

And he quoted with approval from the dissenting opinion in the *Passenger Cases*, 7 How. 283, 492:

> " 'For all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State, for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it.' " 6 Wall., at 48–49.

Usually the right to travel has been founded on the Commerce Clause.[1] See *United States* v. *Guest*, 383 U. S. 745, 758–759. Some, including myself, have thought the right to travel was a privilege and immunity of national

[1] *Helson & Randolph* v. *Kentucky*, 279 U. S. 245, 251; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 339; *Colgate* v. *Harvey*, 296 U. S. 404, 443–444 (Stone, J., dissenting); *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465, 480–481.

citizenship.[2] *Edwards* v. *California*, 314 U. S. 160, 177 (DOUGLAS, J., concurring). Whatever the source, the right exists.[3] See *Graham* v. *Richardson*, 403 U. S. 365;

[2] *Oregon* v. *Mitchell*, 400 U. S. 112, 285 (STEWART, J., concurring and dissenting); *Bell* v. *Maryland*, 378 U. S. 226, 250, 255 (separate opinion of DOUGLAS, J.), 293–294, n. 10 (Goldberg, J., concurring); *New York* v. *O'Neill*, 359 U. S. 1, 12 (DOUGLAS, J., dissenting); *Kent* v. *Dulles*, 357 U. S. 116, 125–127; *Edwards* v. *California*, 314 U. S. 160, 177 (DOUGLAS, J., concurring), 181 (Jackson, J., concurring); *Gilbert* v. *Minnesota*, 254 U. S. 325, 337 (Brandeis, J., dissenting); *Twining* v. *New Jersey*, 211 U. S. 78, 97; *Cook* v. *Pennsylvania*, 97 U. S. 566; *United States* v. *Wheeler*, 254 U. S. 281; *Colgate* v. *Harvey*, 296 U. S., at 429–430; *Slaughter-House Cases*, 16 Wall. 36, 79.

[3] Only the other day in *Dunn* v. *Blumstein*, *ante*, p. 330, we held a durational residence requirement that was a prerequisite to voting invalid because it "directly impinges on the exercise of a . . . fundamental personal right, the right to travel." And we cited a host of "right to travel" cases including *United States* v. *Guest*, 383 U. S. 745, 758; *Passenger Cases*, 7 How. 283, 492 (Taney, C. J., dissenting); *Crandall* v. *Nevada*, 6 Wall. 35; *Paul* v. *Virginia*, 8 Wall. 168, 180; *Edwards* v. *California*, *supra*; *Kent* v. *Dulles*, 357 U. S., at 126; *Shapiro* v. *Thompson*, 394 U. S. 618, 629–631, 634; *Oregon* v. *Mitchell*, 400 U. S., at 237 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.), 285–286 (STEWART, J., concurring and dissenting).

In answer to the argument that actual deterrence of travel need not be shown we said: "It is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. In *Shapiro* we explicitly stated that the compelling state interest test would be triggered by 'any classification which served to *penalize* the exercise of that right [to travel] . . .' [394 U. S.], at 634 (emphasis added); see *id.*, at 638 n. 21. While noting the frank legislative purpose to deter migration by the poor, and speculating that 'an indigent who desires to migrate . . . will doubtless hesitate if he knows that he must risk' the loss of benefits, *id.*, at 628–629, the majority found no need to dispute the 'evidence that few welfare recipients have in fact been deterred [from moving] by residence

Griffin v. *Breckenridge*, 403 U. S. 88, 105–106; *Oregon* v. *Mitchell*, 400 U. S. 112, 237–238 (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *Shapiro* v. *Thompson*, 394 U. S. 618, 630–631; *United States* v. *Guest*, 383 U. S., at 757–758.

Heretofore, we have held that a tax imposed on a carrier but measured by the number of passengers is no different from a direct exaction upon the passengers themselves, whether or not the carrier is authorized to collect the tax from the passengers. *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, 46; *State Freight Tax Case*, 15 Wall. 232, 281. To be sure, getting onto a plane is an intrastate act. But a tax imposed on a local activity that is related to interstate commerce is valid only if the local activity is not such an integral part of interstate commerce that it cannot be realistically separated from it.[4] *Michigan-Wisconsin Pipe Line Co.* v.

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requirements.' *Id.*, at 650 (Warren, C. J., dissenting); see also *id.*, at 671–672 (Harlan, J., dissenting). Indeed, none of the litigants had themselves been deterred." *Ante*, at 339–340.

[4] In *Helson & Randolph* v. *Kentucky*, 279 U. S. 245, for example, we considered a tax imposed by the State of Kentucky upon the use, within its borders, of gasoline by interstate carriers. We determined that such a tax was a direct burden on an instrumentality of interstate commerce and therefore struck it down. We said:

"The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes

Calvert, 347 U. S. 157, 166. In that case the tax struck down was the tax on gas that had been processed for interstate use—and a tax "on the exit of the gas from the State." *Id.*, at 167. We held that that exit was "a part of interstate commerce itself." *Id.*, at 168.

The same is true here, for the step of the passenger enplaning the aircraft is but an instant away from and an inseparable part of an interstate flight.

Of course interstate commerce can be made to pay its fair share of the cost of the local government whose protection it enjoys. But though a local resident can be made to pay taxes to support his community, he cannot be required to pay a fee for making a speech or exercising any other First Amendment right. Like prohibitions obtain when licensing is exacted for exercising constitutional rights. *Lovell* v. *Griffin*, 303 U. S. 444, 451–452; *Thomas* v. *Collins*, 323 U. S. 516, 540–541; *Harman* v. *Forssenius*, 380 U. S. 528, 542. Heretofore we have treated the right to participate in interstate commerce in precisely the same way on the theory that the "power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112. I adhere to that view; federal constitutional rights should neither be "chilled" nor "suffocated."

Are we now to assume that *Calvert* and *Murdock* are no longer the law?

I would affirm the Indiana judgment and reverse New Hampshire's.

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upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.'" *Id.*, at 252.

Syllabus

SIERRA CLUB *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70–34. Argued November 17, 1971—Decided April 19, 1972

Petitioner, a membership corporation with "a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country," brought this suit for a declaratory judgment and an injunction to restrain federal officials from approving an extensive skiing development in the Mineral King Valley in the Sequoia National Forest. Petitioner relies on § 10 of the Administrative Procedure Act, which accords judicial review to a "person suffering legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute." On the theory that this was a "public" action involving questions as to the use of natural resources, petitioner did not allege that the challenged development would affect the club or its members in their activities or that they used Mineral King, but maintained that the project would adversely change the area's aesthetics and ecology. The District Court granted a preliminary injunction. The Court of Appeals reversed, holding that the club lacked standing, and had not shown irreparable injury. *Held:* A person has standing to seek judicial review under the Administrative Procedure Act only if he can show that he himself has suffered or will suffer injury, whether economic or otherwise. In this case, where petitioner asserted no individualized harm to itself or its members, it lacked standing to maintain the action. Pp. 731–741.

433 F. 2d 24, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE and MARSHALL, JJ., joined. DOUGLAS, J., *post*, p. 741, BRENNAN, J., *post*, p. 755, and BLACKMUN, J., *post*, p. 755, filed dissenting opinions. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Leland R. Selna, Jr., argued the cause for petitioner. With him on the briefs was *Matthew P. Mitchell.*

Solicitor General Griswold argued the cause for respondents. With him on the brief were *Assistant Attorney General Kashiwa, Deputy Assistant Attorney General Kiechel, William Terry Bray, Edmund B. Clark,* and *Jacques B. Gelin.*

Briefs of *amici curiae* urging reversal were filed by *Anthony A. Lapham* and *Edward Lee Rogers* for the Environmental Defense Fund; by *George J. Alexander* and *Marcel B. Poché* for the National Environmental Law Society; and by *Bruce J. Terris* and *James W. Moorman* for the Wilderness Society et al.

Briefs of *amici curiae* urging affirmance were filed by *E. Lewis Reid* and *Calvin E. Baldwin* for the County of Tulare; by *Robert C. Keck* for the American National Cattlemen's Assn. et al.; and by *Donald R. Allen* for the Far West Ski Assn. et al.

MR. JUSTICE STEWART delivered the opinion of the Court.

I

The Mineral King Valley is an area of great natural beauty nestled in the Sierra Nevada Mountains in Tulare County, California, adjacent to Sequoia National Park. It has been part of the Sequoia National Forest since 1926, and is designated as a national game refuge by special Act of Congress.[1] Though once the site of extensive mining activity, Mineral King is now used almost exclusively for recreational purposes. Its relative inaccessibility and lack of development have limited the number of visitors each year, and at the same time have preserved the valley's quality as a quasi-wilderness area largely uncluttered by the products of civilization.

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[1] Act of July 3, 1926, § 6, 44 Stat. 821, 16 U. S. C. § 688.

The United States Forest Service, which is entrusted with the maintenance and administration of national forests, began in the late 1940's to give consideration to Mineral King as a potential site for recreational development. Prodded by a rapidly increasing demand for skiing facilities, the Forest Service published a prospectus in 1965, inviting bids from private developers for the construction and operation of a ski resort that would also serve as a summer recreation area. The proposal of Walt Disney Enterprises, Inc., was chosen from those of six bidders, and Disney received a three-year permit to conduct surveys and explorations in the valley in connection with its preparation of a complete master plan for the resort.

The final Disney plan, approved by the Forest Service in January 1969, outlines a $35 million complex of motels, restaurants, swimming pools, parking lots, and other structures designed to accommodate 14,000 visitors daily. This complex is to be constructed on 80 acres of the valley floor under a 30-year use permit from the Forest Service. Other facilities, including ski lifts, ski trails, a cog-assisted railway, and utility installations, are to be constructed on the mountain slopes and in other parts of the valley under a revocable special-use permit. To provide access to the resort, the State of California proposes to construct a highway 20 miles in length. A section of this road would traverse Sequoia National Park, as would a proposed high-voltage power line needed to provide electricity for the resort. Both the highway and the power line require the approval of the Department of the Interior, which is entrusted with the preservation and maintenance of the national parks.

Representatives of the Sierra Club, who favor maintaining Mineral King largely in its present state, followed the progress of recreational planning for the valley

with close attention and increasing dismay. They unsuccessfully sought a public hearing on the proposed development in 1965, and in subsequent correspondence with officials of the Forest Service and the Department of the Interior, they expressed the Club's objections to Disney's plan as a whole and to particular features included in it. In June 1969 the Club filed the present suit in the United States District Court for the Northern District of California, seeking a declaratory judgment that various aspects of the proposed development contravene federal laws and regulations governing the preservation of national parks, forests, and game refuges,[2] and also seeking preliminary and permanent injunctions restraining the federal officials involved from granting their approval or issuing permits in connection with the Mineral King project. The petitioner Sierra Club sued as a membership corporation with "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country," and invoked the judicial-review provisions of the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*

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[2] As analyzed by the District Court, the complaint alleged violations of law falling into four categories. First, it claimed that the special-use permit for construction of the resort exceeded the maximum-acreage limitation placed upon such permits by 16 U. S. C. § 497, and that issuance of a "revocable" use permit was beyond the authority of the Forest Service. Second, it challenged the proposed permit for the highway through Sequoia National Park on the grounds that the highway would not serve any of the purposes of the park, in alleged violation of 16 U. S. C. § 1, and that it would destroy timber and other natural resources protected by 16 U. S. C. §§ 41 and 43. Third, it claimed that the Forest Service and the Department of the Interior had violated their own regulations by failing to hold adequate public hearings on the proposed project. Finally, the complaint asserted that 16 U. S. C. § 45c requires specific congressional authorization of a permit for construction of a power transmission line within the limits of a national park.

After two days of hearings, the District Court granted the requested preliminary injunction. It rejected the respondents' challenge to the Sierra Club's standing to sue, and determined that the hearing had raised questions "concerning possible excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction . . . ." The respondents appealed, and the Court of Appeals for the Ninth Circuit reversed. 433 F. 2d 24. With respect to the petitioner's standing, the court noted that there was "no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the respondents] other than the fact that the actions are personally displeasing or distasteful to them," *id.*, at 33, and concluded:

> "We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority." *Id.*, at 30.

Alternatively, the Court of Appeals held that the Sierra Club had not made an adequate showing of irreparable injury and likelihood of success on the merits to justify issuance of a preliminary injunction. The court thus vacated the injunction. The Sierra Club filed a petition for a writ of certiorari which we granted, 401 U. S. 907, to review the questions of federal law presented.

II

The first question presented is whether the Sierra Club has alleged facts that entitle it to obtain judicial review of the challenged action. Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what

has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," *Baker* v. *Carr*, 369 U. S. 186, 204, as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast* v. *Cohen*, 392 U. S. 83, 101. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.[3]

The Sierra Club relies upon § 10 of the Administrative Procedure Act (APA), 5 U. S. C. § 702, which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency

[3] Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, *Muskrat* v. *United States*, 219 U. S. 346, or to entertain "friendly" suits, *United States* v. *Johnson*, 319 U. S. 302, or to resolve "political questions," *Luther* v. *Borden*, 7 How. 1, because suits of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question whether the litigant is a "proper party to request an adjudication of a particular issue," *Flast* v. *Cohen*, 392 U. S. 83, 100, is one within the power of Congress to determine. Cf. *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 477; *Flast* v. *Cohen*, *supra*, at 120 (Harlan, J., dissenting); *Associated Industries* v. *Ickes*, 134 F. 2d 694, 704. See generally Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L. J. 816, 837 *et seq.* (1969); Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033 (1968).

> action within the meaning of a relevant statute, is entitled to judicial review thereof."

Early decisions under this statute interpreted the language as adopting the various formulations of "legal interest" and "legal wrong" then prevailing as constitutional requirements of standing.[4] But, in *Data Processing Service* v. *Camp*, 397 U. S. 150, and *Barlow* v. *Collins*, 397 U. S. 159, decided the same day, we held more broadly that persons had standing to obtain judicial review of federal agency action under § 10 of the APA where they had alleged that the challenged action had caused them "injury in fact," and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated.[5]

In *Data Processing*, the injury claimed by the petitioners consisted of harm to their competitive position in the computer-servicing market through a ruling by the Comptroller of the Currency that national banks might perform data-processing services for their customers. In *Barlow*, the petitioners were tenant farmers who claimed that certain regulations of the Secretary of Agriculture adversely affected their economic position *vis-à-vis* their landlords. These palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory

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[4] See, *e. g.*, *Kansas City Power & Light Co.* v. *McKay*, 96 U. S. App. D. C. 273, 281, 225 F. 2d 924, 932; *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d 912, 914; *Duba* v. *Schuetzle*, 303 F. 2d 570, 574. The theory of a "legal interest" is expressed in its extreme form in *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479–481. See also *Tennessee Electric Power Co.* v. *TVA*, 306 U. S. 118, 137–139.

[5] In deciding this case we do not reach any questions concerning the meaning of the "zone of interests" test or its possible application to the facts here presented.

provision for judicial review.[6] Thus, neither *Data Processing* nor *Barlow* addressed itself to the question, which has arisen with increasing frequency in federal courts in recent years, as to what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared.[7] That question is presented in this case.

III

The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the "injury in fact" test requires more than an injury to a cognizable

[6] See, *e. g., Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1, 7; *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 83; *FCC* v. *Sanders Bros. Radio Station, supra,* at 477.

[7] No question of standing was raised in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402. The complaint in that case alleged that the organizational plaintiff represented members who were "residents of Memphis, Tennessee who use Overton Park as a park land and recreation area and who have been active since 1964 in efforts to preserve and protect Overton Park as a park land and recreation area."

interest. It requires that the party seeking review be himself among the injured.

The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort. The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.[8]

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[8] The only reference in the pleadings to the Sierra Club's interest in the dispute is contained in paragraph 3 of the complaint, which reads in its entirety as follows:

"Plaintiff Sierra Club is a non-profit corporation organized and operating under the laws of the State of California, with its principal place of business in San Francisco, California since 1892. Membership of the club is approximately 78,000 nationally, with approximately 27,000 members residing in the San Francisco Bay Area. For many years the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested. One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants as hereinafter more fully appears."

In an *amici curiae* brief filed in this Court by the Wilderness Society and others, it is asserted that the Sierra Club has conducted regular camping trips into the Mineral King area, and that various members of the Club have used and continue to use the area for recreational purposes. These allegations were not contained in the pleadings, nor were they brought to the attention of the Court

The Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a "public" action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a "representative of the public." [9] This theory reflects a misunderstanding of our cases involving so-called "public actions" in the area of administrative law.

The origin of the theory advanced by the Sierra Club may be traced to a dictum in *Scripps-Howard Radio* v. *FCC*, 316 U. S. 4, in which the licensee of a radio station in Cincinnati, Ohio, sought a stay of an order of the FCC allowing another radio station in a nearby city to change its frequency and increase its range. In discussing its power to grant a stay, the Court noted that "these private litigants have standing only as representatives of the public interest." *Id.*, at 14. But that observation did not describe the basis upon which the appellant was allowed to obtain judicial review as a "person aggrieved" within the meaning of the statute involved in that case,[10] since Scripps-

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of Appeals. Moreover, the Sierra Club in its reply brief specifically declines to rely on its individualized interest, as a basis for standing. See n. 15, *infra*. Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure.

[9] This approach to the question of standing was adopted by the Court of Appeals for the Second Circuit in *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F. 2d 97, 105:

"We hold, therefore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest."

[10] The statute involved was § 402 (b) (2) of the Communications Act of 1934, 48 Stat. 1093.

Howard was clearly "aggrieved" by reason of the economic injury that it would suffer as a result of the Commission's action.[11] The Court's statement was, rather, directed to the theory upon which Congress had authorized judicial review of the Commission's actions. That theory had been described earlier in *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 477, as follows:

> "Congress had some purpose in enacting § 402 (b)(2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal."

Taken together, *Sanders* and *Scripps-Howard* thus established a dual proposition: the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.[12] It was in the latter sense that the "standing" of the appellant in *Scripps-Howard* existed only as a "representative of the public interest." It is in a similar sense that we have used the phrase "private attorney general" to

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[11] This much is clear from the *Scripps-Howard* Court's citation of *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, in which the basis for standing was the competitive injury that the appellee would have suffered by the licensing of another radio station in its listening area.

[12] The distinction between standing to initiate a review proceeding, and standing to assert the rights of the public or of third persons once the proceeding is properly initiated, is discussed in 3 K. Davis, Adminstrative Law Treatise §§ 22.05–22.07 (1958).

describe the function performed by persons upon whom Congress has conferred the right to seek judicial review of agency action. See *Data Processing, supra,* at 154.

The trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been toward recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and toward discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review.[13] We noted this development with approval in *Data Processing,* 397 U. S., at 154, in saying that the interest alleged to have been injured "may reflect 'aesthetic, conservational, and recreational' as well as economic values." But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.

Some courts have indicated a willingness to take this latter step by conferring standing upon organiza-

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[13] See, *e. g., Environmental Defense Fund* v. *Hardin,* 138 U. S. App. D. C. 391, 395, 428 F. 2d 1093, 1097 (interest in health affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); *Office of Communication of the United Church of Christ* v. *FCC,* 123 U. S. App. D. C. 328, 339, 359 F. 2d 994, 1005 (interest of television viewers in the programing of a local station licensed by the FCC); *Scenic Hudson Preservation Conf.* v. *FPC,* 354 F. 2d 608, 615–616 (interests in aesthetics, recreation, and orderly community planning affected by FPC licensing of a hydroelectric project); *Reade* v. *Ewing,* 205 F. 2d 630, 631–632 (interest of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration); *Crowther* v. *Seaborg,* 312 F. Supp. 1205, 1212 (interest in health and safety of persons residing near the site of a proposed atomic blast).

tions that have demonstrated "an organizational interest in the problem" of environmental or consumer protection. *Environmental Defense Fund* v. *Hardin*, 138 U. S. App. D. C. 391, 395, 428 F. 2d 1093, 1097.[14] It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. See, *e. g.*, *NAACP* v. *Button*, 371 U. S. 415, 428. But a mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the

[14] See *Citizens Committee for the Hudson Valley* v. *Volpe*, n. 9, *supra*; *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 325 F. Supp. 728, 734–736; *Izaak Walton League* v. *St. Clair*, 313 F. Supp. 1312, 1317. See also *Scenic Hudson Preservation Conf.* v. *FPC*, *supra*, at 616:

"In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under § 313 (b) [of the Federal Power Act]."

In most, if not all, of these cases, at least one party to the proceeding did assert an individualized injury either to himself or, in the case of an organization, to its members.

same bona fide special interest would not also be entitled to do so.

The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process.[15] It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.[16] The principle that the Sierra Club would have us establish in this case would do just that.

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[15] In its reply brief, after noting the fact that it might have chosen to assert individualized injury to itself or to its members as a basis for standing, the Sierra Club states:

"The Government seeks to create a 'heads I win, tails you lose' situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest. Counsel have shaped their case to avoid this trap."

The short answer to this contention is that the "trap" does not exist. The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief. See n. 12 and accompanying text, *supra*.

[16] Every schoolboy may be familiar with Alexis de Tocqueville's famous observation, written in the 1830's, that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 Democracy in America 280 (1945). Less familiar, however, is De Tocqueville's further observation that judicial review is effective largely because it is not

As we conclude that the Court of Appeals was correct in its holding that the Sierra Club lacked standing to maintain this action, we do not reach any other questions presented in the petition, and we intimate no view on the merits of the complaint. The judgment is

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

I share the views of my Brother BLACKMUN and would reverse the judgment below.

The critical question of "standing" [1] would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public con-

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available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury.

"It will be seen, also, that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution." *Id.*, at 102.

[1] See generally *Data Processing Service* v. *Camp*, 397 U. S. 150 (1970); *Barlow* v. *Collins*, 397 U. S. 159 (1970); *Flast* v. *Cohen*, 392 U. S. 83 (1968). See also MR. JUSTICE BRENNAN'S separate opinion in *Barlow* v. *Collins*, *supra*, at 167. The issue of statutory standing aside, no doubt exists that "injury in fact" to "aesthetic" and "conservational" interests is here sufficiently threatened to satisfy the case-or-controversy clause. *Data Processing Service* v. *Camp*, *supra*, at 154.

cern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should Trees Have Standing?—Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972). This suit would therefore be more properly labeled as *Mineral King* v. *Morton.*

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes.[2] The corporation sole—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases.[3] The ordinary corporation is a "person" for purposes of the adjudicatory processes,

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[2] *In rem* actions brought to adjudicate libelants' interests in vessels are well known in admiralty. G. Gilmore & C. Black, The Law of Admiralty 31 (1957). But admiralty also permits a salvage action to be brought in the name of the rescuing vessel. *The Camanche,* 8 Wall. 448, 476 (1869). And, in collision litigation, the first-libeled ship may counterclaim in its own name. *The Gylfe* v. *The Trujillo,* 209 F. 2d 386 (CA2 1954). Our case law has personified vessels:

"A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron . . . . In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed . . . . She acquires a personality of her own." *Tucker* v. *Alexandroff,* 183 U. S. 424, 438.

[3] At common law, an officeholder, such as a priest or the king, and his successors constituted a corporation sole, a legal entity distinct from the personality which managed it. Rights and duties were deemed to adhere to this device rather than to the officeholder in order to provide continuity after the latter retired. The notion is occasionally revived by American courts. *E. g., Reid* v. *Barry,* 93 Fla. 849, 112 So. 846 (1927), discussed in Recent Cases, 12 Minn. L. Rev. 295 (1928), and in Note, 26 Mich. L. Rev. 545 (1928); see generally 1 W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 50–53 (1963); 1 P. Potter, Law of Corporations 27 (1881).

whether it represents proprietary, spiritual, aesthetic, or charitable causes.[4]

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.

I do not know Mineral King. I have never seen it nor traveled it, though I have seen articles describing its proposed "development" [5] notably Hano, Protectionists vs. recreationists—The Battle of Mineral King,

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[4] Early jurists considered the conventional corporation to be a highly artificial entity. Lord Coke opined that a corporation's creation "rests only in intendment and consideration of the law." *Case of Sutton's Hospital*, 77 Eng. Rep. 937, 973 (K. B. 1612). Mr. Chief Justice Marshall added that the device is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819). Today, suits in the names of corporations are taken for granted.

[5] Although in the past Mineral King Valley has annually supplied about 70,000 visitor-days of simpler and more rustic forms of recreation—hiking, camping, and skiing (without lifts)—the Forest Service in 1949 and again in 1965 invited developers to submit proposals to "improve" the Valley for resort use. Walt Disney Productions won the competition and transformed the Service's idea into a mammoth project 10 times its originally proposed dimensions. For example,

N. Y. Times Mag., Aug. 17, 1969, p. 25; and Browning, Mickey Mouse in the Mountains, Harper's, March 1972, p. 65. The Sierra Club in its complaint alleges that "[o]ne of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains." The District Court held that this uncontested allegation made the Sierra Club "sufficiently aggrieved" to have "standing" to sue on behalf of Mineral King.

Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp

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while the Forest Service prospectus called for an investment of at least $3 million and a sleeping capacity of at least 100, Disney will spend $35.3 million and will bed down 3,300 persons by 1978. Disney also plans a nine-level parking structure with two supplemental lots for automobiles, 10 restaurants and 20 ski lifts. The Service's annual license revenue is hitched to Disney's profits. Under Disney's projections, the Valley will be forced to accommodate a tourist population twice as dense as that in Yosemite Valley on a busy day. And, although Disney has bought up much of the private land near the project, another commercial firm plans to transform an adjoining 160-acre parcel into a "piggyback" resort complex, further adding to the volume of human activity the Valley must endure. See generally Note, Mineral King Valley: Who Shall Watch the Watchmen?, 25 Rutgers L. Rev. 103, 107 (1970); Thar's Gold in Those Hills, 206 The Nation 260 (1968). For a general critique of mass recreation enclaves in national forests see Christian Science Monitor, Nov. 22, 1965, p. 5, col. 1 (Western ed.). Michael Frome cautions that the national forests are "fragile" and "deteriorate rapidly with excessive recreation use" because "[t]he trampling effect alone eliminates vegetative growth, creating erosion and water runoff problems. The concentration of people, particularly in horse parties, on excessively steep slopes that follow old Indian or cattle routes, has torn up the landscape of the High Sierras in California and sent tons of wilderness soil washing downstream each year." M. Frome, The Forest Service 69 (1971).

in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be few or many. Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.

The Solicitor General, whose views on this subject are in the Appendix to this opinion, takes a wholly different approach. He considers the problem in terms of "government by the Judiciary." With all respect, the problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed. It is, of course, true that most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the "public interest." Yet "public interest" has so many differing shades of meaning as to be quite meaningless on the environmental front. Congress accordingly has adopted ecological standards in the National Environmental Policy Act of 1969, Pub. L. 91–190, 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, and guidelines for agency action have been provided by the Council on Environmental Quality of which Russell E. Train is Chairman. See 36 Fed. Reg. 7724.

Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency

which in time develops between the regulator and the regulated.[6] As early as 1894, Attorney General Olney predicted that regulatory agencies might become "indus-

[6] The federal budget annually includes about $75 million for underwriting about 1,500 advisory committees attached to various regulatory agencies. These groups are almost exclusively composed of industry representatives appointed by the President or by Cabinet members. Although public members may be on these committees, they are rarely asked to serve. Senator Lee Metcalf warns: "Industry advisory committees exist inside most important federal agencies, and even have offices in some. Legally, their function is purely as kibitzer, but in practice many have become internal lobbies—printing industry handouts in the Government Printing Office with taxpayers' money, and even influencing policies. Industry committees perform the dual function of stopping government from finding out about corporations while at the same time helping corporations get inside information about what government is doing. Sometimes, the same company that sits on an advisory council that obstructs or turns down a government questionnaire is precisely the company which is withholding information the government needs in order to enforce a law." Metcalf, The Vested Oracles: How Industry Regulates Government, 3 The Washington Monthly, July 1971, p. 45. For proceedings conducted by Senator Metcalf exposing these relationships, see Hearings on S. 3067 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 91st Cong., 2d Sess. (1970); Hearings on S. 1637, S. 1964, and S. 2064 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 92d Cong., 1st Sess. (1971).

The web spun about administrative agencies by industry representatives does not depend, of course, solely upon advisory committees for effectiveness. See Elman, Administrative Reform of the Federal Trade Commission, 59 Geo. L. J. 777, 788 (1971); Johnson, A New Fidelity to the Regulatory Ideal, 59 Geo. L. J. 869, 874, 906 (1971); R. Berkman & K. Viscusi, Damming The West, The Ralph Nader Study Group Report on The Bureau of Reclamation 155 (1971); R. Fellmeth, The Interstate Commerce Omission, The Ralph Nader Study Group Report on the Interstate Commerce Commission and Transportation 15–39 and *passim* (1970); J. Turner, The Chemical Feast, The Ralph Nader Study Group Report on Food

try-minded," as illustrated by his forecast concerning the Interstate Commerce Commission:

> "The Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things." M. Josephson, The Politicos 526 (1938).

Years later a court of appeals observed, "the recurring question which has plagued public regulation of industry [is] whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect." *Moss* v. *CAB*, 139 U. S. App. D. C. 150, 152, 430 F. 2d 891, 893. See also *Office of Communication of the United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 337–338, 359 F. 2d 994, 1003–1004; *Udall* v. *FPC*, 387 U. S. 428; *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, 146 U. S. App. D. C. 33, 449 F. 2d 1109; *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 142 U. S. App. D. C. 74, 439 F. 2d 584; *Environmental Defense Fund, Inc.* v. *HEW*, 138 U. S. App. D. C. 381, 428 F. 2d 1083; *Scenic Hudson Preservation Conf.* v. *FPC*, 354 F. 2d 608, 620. But see Jaffe, The Federal Regulatory Agencies In Perspective: Administrative Limitations In A Political Setting, 11 B. C. Ind. & Com. L. Rev. 565 (1970) (labels "industry-mindedness" as "devil" theory).

Protection and the Food and Drug Administration *passim* (1970); Massel, The Regulatory Process, 26 Law & Contemp. Prob. 181, 189 (1961); J. Landis, Report on Regulatory Agencies to the President-Elect 13, 69 (1960).

The Forest Service—one of the federal agencies behind the scheme to despoil Mineral King—has been notorious for its alignment with lumber companies, although its mandate from Congress directs it to consider the various aspects of multiple use in its supervision of the national forests.[7]

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[7] The Forest Reserve Act of 1897, 30 Stat. 35, 16 U. S. C. § 551, imposed upon the Secretary of the Interior the duty to "preserve the [national] forests . . . from destruction" by regulating their "occupancy and use." In 1905 these duties and powers were transferred to the Forest Service created within the Department of Agriculture by the Act of Feb. 1, 1905, 33 Stat. 628, 16 U. S. C. § 472. The phrase "occupancy and use" has been the cornerstone for the concept of "multiple use" of national forests, that is, the policy that uses other than logging were also to be taken into consideration in managing our 154 national forests. This policy was made more explicit by the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U. S. C. §§ 528–531, which provides that competing considerations should include outdoor recreation, range, timber, watershed, wildlife, and fish purposes. The Forest Service, influenced by powerful logging interests, has, however, paid only lip service to its multiple-use mandate and has auctioned away millions of timberland acres without considering environmental or conservational interests. The importance of national forests to the construction and logging industries results from the type of lumber grown therein which is well suited to builders' needs. For example, Western acreage produces Douglas fir (structural support) and ponderosa pine (plywood lamination). In order to preserve the total acreage and so-called "maturity" of timber, the annual size of a Forest Service harvest is supposedly equated with expected yearly reforestation. Nonetheless, yearly cuts have increased from 5.6 billion board feet in 1950 to 13.74 billion in 1971. Forestry professionals challenge the Service's explanation that this harvest increase to 240% is not really overcutting but instead has resulted from its improved management of timberlands. "Improved management," answer the critics, is only a euphemism for exaggerated regrowth forecasts by the Service. N. Y. Times, Nov. 15, 1971, p. 48, col. 1. Recent rises in lumber prices have caused a new round of industry pressure to auction more federally owned timber. See Wagner, Resources Report/Lumber-

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal

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men, conservationists head for new battle over government timber, 3 National J. 657 (1971).

Aside from the issue of how much timber should be cut annually, another crucial question is *how* lumber should be harvested. Despite much criticism, the Forest Service had adhered to a policy of permitting logging companies to "clearcut" tracts of auctioned acreage. "Clearcutting," somewhat analogous to strip mining, is the indiscriminate and complete shaving from the earth of all trees—regardless of size or age—often across hundreds of contiguous acres.

Of clearcutting, Senator Gale McGee, a leading antagonist of Forest Service policy, complains: "The Forest Service's management policies are wreaking havoc with the environment. Soil is eroding, reforestation is neglected if not ignored, streams are silting, and clearcutting remains a basic practice." N. Y. Times, Nov. 14, 1971, p. 60, col. 2. He adds: "In Wyoming . . . the Forest Service is very much . . . nursemaid . . . to the lumber industry . . . ." Hearings on Management Practices on the Public Lands before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, pt. 1, p. 7 (1971).

Senator Jennings Randolph offers a similar criticism of the leveling by lumber companies of large portions of the Monongahela National Forest in West Virginia. *Id.*, at 9. See also 116 Cong. Rec. 36971 (reprinted speech of Sen. Jennings Randolph concerning Forest Service policy in Monongahela National Forest). To investigate similar controversy surrounding the Service's management of the Bitterroot National Forest in Montana, Senator Lee Metcalf recently asked forestry professionals at the University of Montana to study local harvesting practices. The faculty group concluded that public dissatisfaction had arisen from the Forest Service's "overriding concern for sawtimber production" and its "insensitivity to the related forest uses and to the . . . public's interest in environmental values." S. Doc. No. 91–115, p. 14 (1970). See also Behan, Timber Mining: Accusation or Prospect?, American Forests, Nov. 1971, p. 4 (additional comments of faculty participant); Reich, The Public and the Nation's Forests, 50 Calif. L. Rev. 381–400 (1962).

Former Secretary of the Interior Walter Hickel similarly faulted clearcutting as excusable only as a money-saving harvesting practice

agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.[8]

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for large lumber corporations. W. Hickel, Who Owns America? 130 (1971). See also Risser, The U. S. Forest Service: Smokey's Strip Miners, 3 The Washington Monthly, Dec. 1971, p. 16. And at least one Forest Service study team shares some of these criticisms of clear-cutting. U. S. Dept. of Agriculture, Forest Management in Wyoming 12 (1971). See also Public Land Law Review Comm'n, Report to the President and to the Congress 44 (1970); Chapman, Effects of Logging upon Fish Resources of the West Coast, 60 J. of Forestry 533 (1962).

A third category of criticism results from the Service's huge backlog of delayed reforestation projects. It is true that Congress has underfunded replanting programs of the Service but it is also true that the Service and lumber companies have regularly ensured that Congress fully funds budgets requested for the Forest Service's "timber sales and management." M. Frome, The Environment and Timber Resources, in What's Ahead for Our Public Lands? 23, 24 (H. Pyles ed. 1970).

[8] Permitting a court to appoint a representative of an inanimate object would not be significantly different from customary judicial appointments of guardians *ad litem,* executors, conservators, receivers, or counsel for indigents.

The values that ride on decisions such as the present one are often not appreciated even by the so-called experts.

"A teaspoon of living earth contains 5 million bacteria, 20 million fungi, one million protozoa, and 200,000 algae. No living human can predict what vital miracles may be locked in this dab of life, this stupendous reservoir of genetic materials that have evolved continuously since the dawn of the earth. For example, molds have existed on earth for about 2 billion years. But only in this century did we unlock the secret of the penicillins, tetracyclines, and other antibiotics from the lowly molds, and thus fashion the most powerful and effective medicines ever discovered by man. Medical scientists still wince at the thought that we might have inadvertently wiped

Perhaps they will not win. Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?

Those who hike the Appalachian Trail into Sunfish Pond, New Jersey, and camp or sleep there, or run the

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out the rhesus monkey, medically, the most important research animal on earth. And who knows what revelations might lie in the cells of the blackback gorilla nesting in his eyrie this moment in the Virunga Mountains of Rwanda? And what might we have learned from the European lion, the first species formally noted (in 80 A. D.) as extinct by the Romans?

"When a species is gone, it is gone forever. Nature's genetic chain, billions of years in the making, is broken for all time." Conserve—Water, Land and Life, Nov. 1971, p. 4.

Aldo Leopold wrote in Round River 147 (1953):

"In Germany there is a mountain called the Spessart. Its south slope bears the most magnificent oaks in the world. American cabinetmakers, when they want the last word in quality, use Spessart oak. The north slope, which should be the better, bears an indifferent stand of Scotch pine. Why? Both slopes are part of the same state forest; both have been managed with equally scrupulous care for two centuries. Why the difference?

"Kick up the litter under the oaks and you will see that the leaves rot almost as fast as they fall. Under the pines, though, the needles pile up as a thick duff; decay is much slower. Why? Because in the Middle Ages the south slope was preserved as a deer forest by a hunting bishop; the north slope was pastured, plowed, and cut by settlers, just as we do with our woodlots in Wisconsin and Iowa today. Only after this period of abuse was the north slope replanted to pines. During this period of abuse something happened to the microscopic flora and fauna of the soil. The number of species was greatly reduced, i. e., the digestive apparatus of the soil lost some of its parts. Two centuries of conservation have not sufficed to restore these losses. It required the modern microscope, and a century of research in soil science, to discover the existence of these 'small cogs and wheels' which determine harmony or disharmony between men and land in the Spessart."

Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas may be treated differently. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life [9] which it represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.

Ecology reflects the land ethic; and Aldo Leopold wrote in A Sand County Almanac 204 (1949), "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land."

That, as I see it, is the issue of "standing" in the present case and controversy.

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[9] Senator Cranston has introduced a bill to establish a 35,000-acre Pupfish National Monument to honor the pupfish which are one inch long and are useless to man. S. 2141, 92d Cong., 1st Sess. They are too small to eat and unfit for a home aquarium. But as Michael Frome has said:

"Still, I agree with Senator Cranston that saving the pupfish would symbolize our appreciation of diversity in God's tired old biosphere, the qualities which hold it together and the interaction of life forms. When fishermen rise up united to save the pupfish they can save the world as well." Field & Stream, Dec. 1971, p. 74.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

Extract From Oral Argument of the Solicitor General*

. . . . .

"As far as I know, no case has yet been decided which holds that a plaintiff which merely asserts that, to quote from the complaint here, its interest would be widely affected [a]nd that 'it would be aggrieved' by the acts of the defendant, has standing to raise legal questions in court.

"But why not? Do not the courts exist to decide legal questions? And are they not the most impartial and learned agencies that we have in our governmental system? Are there not many questions which must be decided by the courts? Why should not the courts decide any question which any citizen wants to raise?

"As the tenor of my argument indicates, this raises, I think, a true question, perhaps a somewhat novel question, in the separation of powers. . . .

"Ours is not a government by the Judiciary. It is a government of three branches, each of which was intended to have broad and effective powers subject to checks and balances. In litigable cases, the courts have great authority. But the Founders also intended that the Congress should have wide powers, and that the Executive Branch should have wide powers.

"All these officers have great responsibilities. They are not less sworn than are the members of this Court to uphold the Constitution of the United States.

"This, I submit, is what really lies behind the standing doctrine, embodied in those cryptic words 'case' and 'controversy' in Article III of the Constitution.

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*Tr. of Oral Arg. 31–35.

"Analytically one could have a system of government in which every legal question arising in the core of government would be decided by the courts. It would not be, I submit, a good system.

"More important, it is not the system which was ordained and established in our Constitution, as it has been understood for nearly 200 years.

"Over the past 20 or 25 years, there has been a great shift in the decision of legal questions in our governmental operations into the courts. This has been the result of continuous whittling away of the numerous doctrines which have been established over the years, designed to minimize the number of governmental questions which it was the responsibility of the courts to consider.

"I've already mentioned the most ancient of all: case or controversy, which was early relied on to prevent the presentation of feigned issues to the court.

"But there are many other doctrines, which I cannot go into in detail: reviewability, justiciability, sovereign immunity, mootness in various aspects, statutes of limitations and laches, jurisdictional amount, real party in interest, and various questions in relation to joinder.

"Under all of these headings, limitations which previously existed to minimize the number of questions decided in courts, have broken down in varying degrees.

"I might also mention the explosive development of class actions, which has thrown more and more issues into the courts.

. . . . .

"If there is standing in this case, I find it very difficult to think of any legal issue arising in government which will not have to await one or more decisions of the Court before the administrator, sworn to uphold the law, can take any action. I'm not sure that this is good for the government. I'm not sure that it's good for the

courts. I do find myself more and more sure that it is not the kind of allocation of governmental power in our tripartite constitutional system that was contemplated by the Founders.

. . . . .

"I do not suggest that the administrators can act at their whim and without any check at all. On the contrary, in this area they are subject to continuous check by the Congress. Congress can stop this development any time it wants to."

MR. JUSTICE BRENNAN, dissenting.

I agree that the Sierra Club has standing for the reasons stated by my Brother BLACKMUN in Alternative No. 2 of his dissent. I therefore would reach the merits. Since the Court does not do so, however, I simply note agreement with my Brother BLACKMUN that the merits are substantial.

MR. JUSTICE BLACKMUN, dissenting.

The Court's opinion is a practical one espousing and adhering to traditional notions of standing as somewhat modernized by *Data Processing Service* v. *Camp*, 397 U. S. 150 (1970); *Barlow* v. *Collins*, 397 U. S. 159 (1970); and *Flast* v. *Cohen*, 392 U. S. 83 (1968). If this were an ordinary case, I would join the opinion and the Court's judgment and be quite content.

But this is not ordinary, run-of-the-mill litigation. The case poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional

concepts do not quite fit and do not prove to be entirely adequate for new issues?

The ultimate result of the Court's decision today, I fear, and sadly so, is that the 35.3-million-dollar complex, over 10 times greater than the Forest Service's suggested minimum, will now hastily proceed to completion; that serious opposition to it will recede in discouragement; and that Mineral King, the "area of great natural beauty nestled in the Sierra Nevada Mountains," to use the Court's words, will become defaced, at least in part, and, like so many other areas, will cease to be "uncluttered by the products of civilization."

I believe this will come about because: (1) The District Court, although it accepted standing for the Sierra Club and granted preliminary injunctive relief, was reversed by the Court of Appeals, and this Court now upholds that reversal. (2) With the reversal, interim relief by the District Court is now out of the question and a permanent injunction becomes most unlikely. (3) The Sierra Club may not choose to amend its complaint or, if it does desire to do so, may not, at this late date, be granted permission. (4) The ever-present pressure to get the project under way will mount. (5) Once under way, any prospect of bringing it to a halt will grow dim. Reasons, most of them economic, for not stopping the project will have a tendency to multiply. And the irreparable harm will be largely inflicted in the earlier stages of construction and development.

Rather than pursue the course the Court has chosen to take by its affirmance of the judgment of the Court of Appeals, I would adopt one of two alternatives:

1. I would reverse that judgment and, instead, approve the judgment of the District Court which recognized standing in the Sierra Club and granted preliminary relief. I would be willing to do this on condition that the Sierra Club forthwith amend its complaint to meet the

specifications the Court prescribes for standing. If Sierra Club fails or refuses to take that step, so be it; the case will then collapse. But if it does amend, the merits will be before the trial court once again. As the Court, *ante,* at 730 n. 2, so clearly reveals, the issues on the merits are substantial and deserve resolution. They assay new ground. They are crucial to the future of Mineral King. They raise important ramifications for the quality of the country's public land management. They pose the propriety of the "dual permit" device as a means of avoiding the 80-acre "recreation and resort" limitation imposed by Congress in 16 U. S. C. § 497, an issue that apparently has never been litigated, and is clearly substantial in light of the congressional expansion of the limitation in 1956 arguably to put teeth into the old, unrealistic five-acre limitation. In fact, they concern the propriety of the 80-acre permit itself and the consistency of the entire, enormous development with the statutory purposes of the Sequoia Game Refuge, of which the Valley is a part. In the context of this particular development, substantial questions are raised about the use of a national park area for Disney purposes for a new high speed road and a 66,000-volt power line to serve the complex. Lack of compliance with existing administrative regulations is also charged. These issues are not shallow or perfunctory.

2. Alternatively, I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues. This incursion upon tradition need not be very extensive. Certainly, it should be no cause for alarm. It is no more progressive than was the decision in *Data Processing* itself. It need only recognize the interest of one who has a provable,

sincere, dedicated, and established status. We need not fear that Pandora's box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past. Who would have suspected 20 years ago that the concepts of standing enunciated in *Data Processing* and *Barlow* would be the measure for today? And MR. JUSTICE DOUGLAS, in his eloquent opinion, has imaginatively suggested another means and one, in its own way, with obvious, appropriate, and self-imposed limitations as to standing. As I read what he has written, he makes only one addition to the customary criteria (the existence of a genuine dispute; the assurance of adversariness; and a conviction that the party whose standing is challenged will adequately represent the interests he asserts), that is, that the litigant be one who speaks knowingly for the environmental values he asserts.

I make two passing references:

1. The first relates to the Disney figures presented to us. The complex, the Court notes, will accommodate 14,000 visitors *a day* (3,100 overnight; some 800 employees; 10 restaurants; 20 ski lifts). The State of California has proposed to build a new road from Hammond to Mineral King. That road, to the extent of 9.2 miles, is to traverse Sequoia National Park. It will have only two lanes, with occasional passing areas, but it will be capable, it is said, of accommodating 700–800 vehicles per hour and a peak of 1,200 per hour. We are told that the State has agreed not to seek any further improvement in road access through the park.

If we assume that the 14,000 daily visitors come by automobile (rather than by helicopter or bus or other known or unknown means) and that each visiting automobile carries four passengers (an assumption, I am

sure, that is far too optimistic), those 14,000 visitors will move in 3,500 vehicles. If we confine their movement (as I think we properly may for this mountain area) to 12 hours out of the daily 24, the 3,500 automobiles will pass any given point on the two-lane road at the rate of about 300 per hour. This amounts to five vehicles per minute, or an average of one every 12 seconds. This frequency is further increased to one every six seconds when the necessary return traffic along that same two-lane road is considered. And this does not include service vehicles and employees' cars. Is this the way we perpetuate the wilderness and its beauty, solitude, and quiet?

2. The second relates to the fairly obvious fact that any resident of the Mineral King area—the real "user"—is an unlikely adversary for this Disney-governmental project. He naturally will be inclined to regard the situation as one that should benefit him economically. His fishing or camping or guiding or handyman or general outdoor prowess perhaps will find an early and ready market among the visitors. But that glow of anticipation will be short-lived at best. If he is a true lover of the wilderness—as is likely, or he would not be near Mineral King in the first place—it will not be long before he yearns for the good old days when masses of people—that 14,000 influx per day—and their thus far uncontrollable waste were unknown to Mineral King.

Do we need any further indication and proof that all this means that the area will no longer be one "of great natural beauty" and one "uncluttered by the products of civilization?" Are we to be rendered helpless to consider and evaluate allegations and challenges of this kind because of procedural limitations rooted in traditional concepts of standing? I suspect that this may be the result of today's holding. As the Court points out, *ante*, at 738–739, other federal tribunals have

not felt themselves so confined.[1] I would join those progressive holdings.

The Court chooses to conclude its opinion with a footnote reference to De Tocqueville. In this environmental context I personally prefer the older and particularly pertinent observation and warning of John Donne.[2]

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[1] *Environmental Defense Fund, Inc.* v. *Hardin*, 138 U. S. App. D. C. 391, 394–395, 428 F. 2d 1093, 1096–1097 (1970); *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F. 2d 97, 101–105 (CA2 1970), cert. denied, 400 U. S. 949; *Scenic Hudson Preservation Conf.* v. *FPC*, 354 F. 2d 608, 615–617 (CA2 1965); *Izaak Walton League* v. *St. Clair*, 313 F. Supp. 1312, 1316–1317 (Minn. 1970); *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 324 F. Supp. 878, 879–880 (DC 1971); *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 325 F. Supp. 728, 734–736 (ED Ark. 1970–1971); *Sierra Club* v. *Hardin*, 325 F. Supp. 99, 107–112 (Alaska 1971); *Upper Pecos Assn.* v. *Stans*, 328 F. Supp. 332, 333–334 (N. Mex. 1971); *Cape May County Chapter, Inc., Izaak Walton League* v. *Macchia*, 329 F. Supp. 504, 510–514 (N. J. 1971). See *National Automatic Laundry & Cleaning Council* v. *Shultz*, 143 U. S. App. D. C. 274, 278–279, 443 F. 2d 689, 693–694 (1971); *West Virginia Highlands Conservancy* v. *Island Creek Coal Co.*, 441 F. 2d 232, 234–235 (CA4 1971); *Environmental Defense Fund, Inc.* v. *HEW*, 138 U. S. App. D. C. 381, 383 n. 2, 428 F. 2d 1083, 1085 n. 2 (1970); *Honchok* v. *Hardin*, 326 F. Supp. 988, 991 (Md. 1971).

[2] "No man is an Iland, intire of itselfe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any man's death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; it tolls for thee." Devotions XVII.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 760 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM FEBRUARY 22 THROUGH APRIL 17, 1972

FEBRUARY 22, 1972

Affirmed on Appeal

No. 71–533. NATIVE AMERICAN CHURCH OF NAVAJOLAND, INC., ET AL. *v.* ARIZONA CORPORATION COMMISSION. Affirmed on appeal from D. C. Ariz. Reported below: 329 F. Supp. 907.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

This is a direct appeal from the order of a three-judge District Court, convened pursuant to 28 U. S. C. § 2281,[1] denying appellants' prayer for injunctive relief. Jurisdiction over the appeal is based upon 28 U. S. C. § 1253.[2] If the three-judge court were improperly convened, however, the appeal lies not to this Court, but to the Court of Appeals. *Moody* v. *Flowers*, 387 U. S. 97. My anal-

[1] Title 28 U. S. C. § 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

[2] Title 28 U. S. C. § 1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

ysis leads me to conclude that a three-judge court was not required, so I would dismiss this appeal.

The controversy involves the efforts of appellant Native American Church of Navajoland, Inc., to obtain a certificate of incorporation from the Arizona Corporation Commission. According to Arizona law, "Any number of persons may associate themselves together and become incorporated for the transaction of any *lawful* business." Ariz. Rev. Stat. Ann. § 10–121 (emphasis supplied). The Commission refused to issue the certificate for the reason that it believed appellant Church's proposed Articles of Incorporation revealed that the organization had an *unlawful* purpose for incorporating, that being "to work for unity in the use of Peyote, as a Sacrament and as a means of divine healing through its Divine Power." It appears to be conceded that the Commission's decision was prompted by the fact that the use, possession, and sale of peyote is made a misdemeanor by Ariz. Rev. Stat. Ann. § 36–1061, and because peyote is subject to regulation as a "dangerous drug" under Ariz. Rev. Stat. Ann. §§ 32–1964 (A)(7), 32–1965, and 32–1975. Appellants then sought declaratory and injunctive relief from the District Court.

Two injunctions were sought. The first asked that the Corporation Commission be enjoined from refusing to grant appellants a certificate of incorporation "for failure to comply with" Ariz. Rev. Stat. Ann. §§ 10–121 and 36–1061. Insofar as this prayer asked to enjoin Commission action taken under color of Ariz. Rev. Stat. Ann. § 10–121, however, it was insufficient to require a three-judge court. Nowhere in their complaint did appellants attack the constitutionality of § 10–121, either on its face or as applied. Indeed, they concede its constitutionality before this Court, stating explicitly that it is "neutral in scope and application." (Reply Brief for Appellants 4.) But, as has been long held, an action to en-

join the allegedly unconstitutional result reached by the Commission in the exercise of its authority under § 10–121 would not sustain the jurisdiction of a three-judge court. *Phillips* v. *United States*, 312 U. S. 246; *Ex parte Bransford*, 310 U. S. 354; *Ex parte Hobbs*, 280 U. S. 168.

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed at an allegedly erroneous administrative action. . . ." *Ex parte Bransford, supra*, at 361.[3]

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[3] We have recently employed this very distinction in analyzing our jurisdiction under an analogous statute. In *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U. S. 561, the Government attempted to take a direct appeal from the decision of a one-judge district court that the Internal Revenue Service had improperly revoked Christian Echoes' tax exemption as a religious organization under § 501 (c)(3) of the Code (because of alleged political activity). Our jurisdiction over the appeal depended on the constitutionality of § 501 (c)(3) "as applied," having been called into question by the District Judge's opinion. 28 U. S. C. § 1252. Despite the fact that the District Judge found the Service's interpretation of § 501 (c)(3) violated Christian Echoes' First Amendment rights, we held that his commentary did *not* constitute a finding that the statute was unconstitutional "as applied."

"[T]he District Court's commentary on the denial of the appellee's First Amendment rights was directed to the particular interpretation given to § 501 (c)(3) by the Internal Revenue Service in this case and to its means of enforcing that interpretation. . . . The court refused to interpret and apply the section to require an analysis of the 'religious' or 'non-religious' character of every activity by a concededly religious organization, because such an interpretation and application would infringe the right to free exercise

Moreover, a three-judge court was not required to hear appellants' challenge to the Commission's alleged "enforcement" of the Arizona drug law which was attacked as unconstitutional. The Commission is not authorized by state law to enforce criminal statutes. Its authority extends only to the enforcement of the negative implications of Ariz. Rev. Stat. Ann. § 10–121. Its opinion that the use of peyote in religious sacraments is an unlawful purpose for incorporation does not reflect an official position on the part of those state officers who are charged with law enforcement that members of the Native American Church can be arrested for observing the tenets of their religion. Section 2281 requires that appellants' action be one to restrain "the action of any officer of such State in the enforcement or execution of such statute" and this requirement cannot be circumvented "by join-

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of religion. It stated that the Internal Revenue Service had already gone too far in its enforcement of this interpretation. But the statement that the *Service* violated the appellee's First Amendment rights is not the same as a holding that *Congress* did so in enacting § 501 (c)(3). The court avoided holding that the section itself was unconstitutional 'as applied'—*i. e.*, that the section, by its own terms, infringed constitutional freedoms in the circumstances of the particular case. Rather, it held that the Service had misinterpreted § 501 (c)(3) and that the section must be narrowly construed. Although the construction was based on a constitutional premise, it did not amount to a holding that an Act of Congress is unconstitutional . . . ." *Id.*, at 564–566.

Similarly, the fact that the Arizona Corporation Commission might have infringed appellants' First Amendment rights in its interpretation of the phrase "lawful business" in Ariz. Rev. Stat. Ann. § 10–121 does not mean that appellants' commentary on this action called into question the constitutionality of § 10–121 "as applied." As in *Christian Echoes*, "[a]lthough the [attack] was based on a constitutional premise, it did not amount to a [claim] that [the statute] is unconstitutional," *supra*, at 565–566. Rather, it was merely a challenge to "allegedly erroneous administrative action," *Ex parte Bransford*, 310 U. S. 354, 361.

ing, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute," *Wilentz* v. *Sovereign Camp,* 306 U. S. 573, 579–580. This prayer, therefore, was also insufficient to require a three-judge court.

Appellants' second prayer for injunctive relief seems at first glance to cure the above-mentioned defects. It prays that the Governor of Arizona "and his subordinate officials, agents, and employees" be restrained from enforcing the Arizona drug laws against appellants "in any way which infringes upon their right to the free exercise of their religion." The difficulty is that, taking the complaint "as we find it," *Moody* v. *Flowers, supra,* at 104, it nowhere appears that the challenged statutes have ever been, are now, or ever will be enforced against appellants. The complaint, and the motion to dismiss filed in response thereto, permit the inference that Arizona already purports to except the Native American Church from the operation of the challenged laws.[4] An amended complaint might not be open to this criticism. But we require that the substantiality of the federal question presented appear from the face of the pleadings that

[4] Thus, appellee's motion to dismiss, filed in the court below, contained an affidavit from an official of the Narcotics Enforcement Division of the Arizona Department of Public Safety, wherein he averred that he has been with the Department "since 1966 and during that time they have never arrested any members of the Native American Church of Navajoland where such members were holding an alleged religious ceremony and where there was present at such ceremony only Indians."

At least one Arizona court, moreover, has explicitly ruled that its narcotics statute could not constitutionally be applied to members of the Native American Church. *Arizona* v. *Attakai,* Cr. No. 4098, Coconino County, July 26, 1960. The State's appeal in *Attakai* was dismissed by the Arizona Supreme Court.

are filed, not those which might have been. *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386; *Arneson* v. *Denny*, 25 F. 2d 988; *Bunce* v. *Williams*, 159 F. Supp. 325.

Appellants' failure to come under § 2281 might appear to rest on a view of pleading at a variance with the liberal notions which are said to underlie the Federal Rules. But, as we have often remarked, it is § 2281 which is at variance with our notions of orderly federal procedures. It is not "a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States, supra*, at 251.

We should vacate the judgment below and remand for the entry of a fresh decree, so that appellants might pursue their appropriate remedy in the Court of Appeals. *Moody* v. *Flowers, supra; Phillips* v. *United States, supra.*

No. 71–561. KOEHLER ET AL. *v.* OGILVIE, GOVERNOR OF ILLINOIS, ET AL. Affirmed on appeal from D. C. N. D. Ill.

No. 71–658. QUINCY COLLEGE & SEMINARY CORP. ET AL. *v.* BURLINGTON NORTHERN, INC., ET AL. Affirmed on appeal from D. C. N. D. Ill. Reported below: 328 F. Supp. 808.

No. 71–770. PRINSBURG COOP FERTILIZER CO. ET AL. *v.* UNITED STATES ET AL.; and

No. 71–786. STERNER INDUSTRIES, INC. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. Minn.

No. 71–664. CLOUD ET AL. *v.* DEITZ ET AL. Affirmed on appeal from D. C. E. D. Ky. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

Appeals Dismissed

No. 71–657. HAWAIIAN LAND CO., LTD. *v.* DIRECTOR OF TAXATION OF HAWAII. Appeal from Sup. Ct. Hawaii dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 53 Haw. 45, 487 P. 2d 1070.

No. 71–726. JORDAN *v.* MEISSER ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 29 N. Y. 2d 661, 274 N. E. 2d 444.

No. 71–767. KAWITT ET AL. *v.* MAHIN, DIRECTOR OF REVENUE OF ILLINOIS, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 49 Ill. 2d 73, 271 N. E. 2d 35.

No. 71–735. REY *v.* UNITED STATES. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 441 F. 2d 727.

No. 71–822. KING *v.* CITY OF SAN BERNARDINO ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71–746. HARGROVE *v.* NEWSOME ET AL. Appeal from Sup. Ct. Tenn. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— Tenn. ——, 470 S. W. 2d 348.

No. 71–831. GIORDANO ET AL. *v.* STUBBS ET AL. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 228 Ga. 75, 184 S. E. 2d 165.

No. 71–838. PHOENIX NEWSPAPERS, INC., ET AL. *v.* CHURCH. Appeal from Super. Ct. Ariz., County of Maricopa, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71–5558. NEWSOME *v.* NEW YORK. Appeal from App. Term, Sup. Ct. N. Y., 2d and 11th Jud. Dists., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded. (See also No. 70–5075, *ante*, p. 1, and No. 71–352, *ante*, p. 9.)

No. 71–298. ROSENGART *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for reconsideration in light of suggestions of the Solicitor General and upon independent examination of entire record. Reported below: 449 F. 2d 523.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST concur, dissenting.

The Court vacates the judgment of the Court of Appeals, 449 F. 2d 523, and directs that the Court of Appeals consider the views of the United States presented in this case. Finding the suggestions of the United States unacceptable, I dissent from today's judgment.

In its memorandum filed October 13, 1971, in response to the petition for certiorari, the United States asserted that in passing on petitioner's conscientious objector's claim the Army considered petitioner's opposition to war to be sincere and rejected the claim solely because peti-

tioner's views did not qualify as religious under the standards of *Welsh* v. *United States*, 398 U. S. 333 (1970). It was therefore error, the United States urged, for the Court of Appeals to have put aside the *Welsh* issue and to have affirmed the denial of habeas corpus on insincerity grounds after making an "independent search of the administrative record" to discover a basis in fact for such a judgment.

These assertions were incredible. The Army Review Board, in its final order entered on September 10, 1970, denying the conscientious objector claim, unanimously found that "1LT Rosengart's purported conscientious objector beliefs are not truly held; and that any objection to war in any form he might sincerely hold is based solely on philosophical views and sociological experiences." The plain meaning of this order is that the Board both found that petitioner was not sincere and determined that his views were solely philosophical and sociological.

The Court of Appeals so read the Board's order, saying "[t]he Board found that any conscientious objection held by Rosengart was based solely on philosophical views and sociological experiences (a curious finding in the light of *Welsh*) *and* that Rosengart's 'purported conscientious [objector] beliefs are not truly held.'" *Supra*, at 528. The Court of Appeals then put aside the issue of whether petitioner's beliefs were religious within the meaning of the Act and affirmed the denial of habeas corpus after agreeing with the District Court that there was a basis in fact for a conclusion of insincerity because the record "cast a cloud upon the sincerity of his professed deeply-held beliefs of conscientious objection." *Ibid.*

There was nothing untoward in the way the Court of Appeals approached the case, particularly since the United States in its October 13 memorandum flatly asserted that there was indeed sufficient evidence in the

record to support the judgment of insincerity and that "under normal circumstances, such evidence would, in our view, provide ample factual basis for a denial of petitioner's application for discharge."

When asked for further response, the United States filed a supplemental memorandum on December 10, 1971, modifying its position. It now concedes the dual basis of the Board's order and that "[v]iewed solely in light of the September 10 Board decision, the majority's conclusion in this regard is not unwarranted." It also reveals that "[i]ndeed, such a result was suggested by the government's argument below . . . ." Nevertheless, although again not disagreeing "with the conclusion reached by the majority below that there was basis in fact on this record to sustain a finding of 'insincerity' with respect to petitioner's claimed opposition to war," the Government's position in the Court of Appeals is characterized as placing "undue emphasis on the final recommendation of the Army Review Board." It is now urged that the Board's September 10 decision be read in conjunction with its earlier decisions and that in context the Board be deemed to have found petitioner to be sincere.

I find nothing to commend the Government's position in this case. It would be one thing if it forthrightly supported petitioner's sincerity. It is quite another thing to assert that the record supports a judgment of insincerity, and then, notwithstanding this concession, to urge setting aside the final order of the Army Review Board which plainly found petitioner insincere and which the United States does not straightforwardly argue was beyond the power of the Board.

No. 71–5709. JIMENEZ *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Haines* v. *Kerner,* 404 U. S. 519.

No. 71–757. KING ET AL. *v.* JONES ET AL. C. A. 6th Cir. Certiorari granted. Judgment of the Court of Appeals vacated and case remanded to the District Court for the Northern District of Ohio with directions to dismiss proceedings as moot. Reported below: 450 F. 2d 478.

Miscellaneous Orders

No. A–520. IN RE DISBARMENT OF SAMPLES. It having been reported to the Court that Franklin P. Samples of Huntsville, Alabama, has been disbarred from the practice of law by the Supreme Court of Alabama, duly entered September 1, 1971, and this Court by order of November 22, 1971 [404 U. S. 963], having suspended the said Franklin P. Samples from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, and that the time within which to file a return to the rule has expired;

IT IS ORDERED that the said Franklin P. Samples be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. A–771. PESOLI ET AL. *v.* MURPHY ET AL. C. A. 7th Cir. Application for temporary injunction presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS is of the opinion that the application should be granted as to applicant Pesoli, he having been suspended solely on the ground that he invoked the self-incrimination clause of the Fifth Amendment.

No. A–775. CULADO *v.* UNITED STATES. C. A. 2d Cir. Application for stay of mandate presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–816. BULLOCK, SECRETARY OF STATE OF TEXAS *v.* WEISER ET AL. D. C. N. D. Tex. Motion of appellees to advance and expedite and to dispense with printing denied.

No. A–822. THORBUS *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–838. WOODSUM *v.* BOYD ET AL. D. C. M. D. Fla. Application for stay order presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. 69–5003. FURMAN *v.* GEORGIA; and
No. 69–5030. JACKSON *v.* GEORGIA. Sup. Ct. Ga. [Certiorari granted, 403 U. S. 952.] Motion of respondent for leave to file supplemental brief, after argument, granted.

No. 70–75. MOOSE LODGE NO. 107 *v.* IRVIS ET AL. Appeal from D. C. M. D. Pa. [Probable jurisdiction postponed, 401 U. S. 992.] Motion of the Attorney General of Pennsylvania for leave to participate in oral argument denied.

No. 70–5015. ARGERSINGER *v.* HAMLIN, SHERIFF. Sup. Ct. Fla. [Certiorari granted, 401 U. S. 908.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and a total of 20 minutes allotted for that purpose.

No. 70–5276. MUREL ET AL. *v.* BALTIMORE CITY CRIMINAL COURT ET AL. C. A. 4th Cir. [Certiorari granted, 404 U. S. 999.] Motion of petitioners for additional time for oral argument denied. MR. JUSTICE STEWART is of the opinion that the motion should be granted. Motion for additional counsel to argue on behalf of petitioners granted.

No. 70–5112. WEBER *v.* AETNA CASUALTY & SURETY CO. ET AL. Sup. Ct. La. [Certiorari granted, 404 U. S. 821.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 71–224. SWENSON, WARDEN *v.* STIDHAM. C. A. 8th Cir. [Certiorari granted, 404 U. S. 1058.] Motion of respondent for appointment of counsel granted. It is ordered that Mark M. Hennelly, Esquire, of St. Louis, Missouri, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 71–247. RABE *v.* WASHINGTON. Sup. Ct. Wash. [Certiorari granted, 404 U. S. 909.] Motion of Morality in Media, Inc., for leave to file a brief as *amicus curiae* granted.

No. 71–404. COLTEN *v.* KENTUCKY. Appeal from Ct. App. Ky. [Probable jurisdiction noted, 404 U. S. 1014.] Motion of M. Curran Clem, Esquire, for leave to permit Robert W. Willmott, Jr., Esquire, to argue orally *pro hac vice* on behalf of appellee granted.

No. 71–801. COUNTY OF ALAMEDA ET AL. *v.* CALIFORNIA WELFARE RIGHTS ORGANIZATION ET AL. Appeal from Sup. Ct. Cal. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 5 Cal. 3d 730, 488 P. 2d 953.

No. 71–834. MCCLANAHAN *v.* ARIZONA TAX COMMISSION. Appeal from Ct. App. Ariz. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 14 Ariz. App. 452, 484 P. 2d 221.

No. 71–5656. PHILPOTT ET AL. *v.* ESSEX COUNTY WELFARE BOARD. Sup. Ct. N. J. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 59 N. J. 75, 279 A. 2d 806.

No. 71–5423. MOSES ET AL. *v.* WASHINGTON. Sup. Ct. Wash. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 79 Wash. 2d 104, 483 P. 2d 832.

No. 71–982. HALL, SECRETARY OF HUMAN RELATIONS AGENCY, ET AL. *v.* VILLA ET AL. Sup. Ct. Cal. Motion of Attorney General of California for accelerated consideration of petition and to postpone oral argument in No. 70–5064 [*Jefferson* v. *Hackney*, probable jurisdiction noted, 404 U. S. 820] denied. Reported below: 6 Cal. 3d 227, 490 P. 2d 1148.

No. 71–5078. PETERS *v.* KIFF, WARDEN. C. A. 5th Cir. [Certiorari granted, 404 U. S. 964.] Motion of NAACP Legal Defense & Educational Fund, Inc., for leave to file a brief as *amicus curiae* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 71–5255. BARKER *v.* WINGO, WARDEN. C. A. 6th Cir. [Certiorari granted, 404 U. S. 1037.] Motion of J. Chester Porter, Esquire, for leave to permit James E. Milliman, Esquire, to argue orally *pro hac vice* on behalf of petitioner granted.

No. 71–5677. JUSTICE *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. Motion for leave to file and petition for writ of habeas corpus denied.

No. 71–5582. GERARDI *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 71–666. UNITED STATES *v.* GLAXO GROUP LTD. ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 328 F. Supp. 709.

No. 71–703. UNITED STATES *v.* FIRST NATIONAL BANCORPORATION, INC., ET AL. Appeal from D. C. Colo. Probable jurisdiction noted. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 329 F. Supp. 1003.

No. 71–749. UNITED STATES *v.* KRAS. Appeal from D. C. E. D. N. Y. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 331 F. Supp. 1207.

Certiorari Granted

No. 71–678. EXECUTIVE JET AVIATION, INC., ET AL. *v.* CITY OF CLEVELAND ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 448 F. 2d 151.

No. 71–485. GOTTSCHALK, ACTING COMMISSIONER OF PATENTS *v.* BENSON ET AL. C. C. P. A. Motions of Information Industry Assn., International Business Machines Corp., and Business Equipment Manufacturers Assn. for leave to file briefs as *amici curiae* granted. Certiorari granted. MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL took no part in the consideration or decision of these motions and petition. Reported below: —— C. C. P. A. (Pat.) ——, 441 F. 2d 682.

No. 71–708. TRAFFICANTE ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. C. A. 9th Cir. Motion to dispense with printing petition and certiorari granted. Reported below: 446 F. 2d 1158.

No. 71–827. HUGHES TOOL CO. ET AL. *v.* TRANS WORLD AIRLINES, INC.; and

No. 71–830. TRANS WORLD AIRLINES, INC. *v.* HUGHES TOOL CO. ET AL. C. A. 2d Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 449 F. 2d 51.

No. 71–1017. GRAVEL *v.* UNITED STATES; and

No. 71–1026. UNITED STATES *v.* GRAVEL. C. A. 1st Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 455 F. 2d 753.

No. 71–5421. MIDGETT *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument with No. 71–5103 [*Morrissey* v. *Brewer*, certiorari granted, 404 U. S. 999]. Reported below: 443 F. 2d 1090.

No. 71–5685. JOHNSON ET AL. *v.* NEW YORK STATE EDUCATION DEPARTMENT ET AL. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 449 F. 2d 871.

Certiorari Denied. (See also Nos. 71–735, 71–822, 71–831, 71–838, 71–5558, and 71–746, *supra.*)

No. 70–5291. MORGAN ET AL. *v.* NEIL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–269. NATIONAL BREWING CO. *v.* CALDWELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 1044.

No. 71–403. GOUGH INDUSTRIES, INC. *v.* ROTHMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 536.

No. 71–434. LOUISIANA MATERIALS CO., INC. *v.* CRONVICH, SHERIFF, ET AL. Sup. Ct. La. Certiorari denied. Reported below: 258 La. 1039, 249 So. 2d 123.

No. 71–521. DESERT OUTDOOR ADVERTISING, INC., ET AL. *v.* COUNTY OF RIVERSIDE. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 71–655. CROSBY ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–667. GROSS ET AL. *v.* WALSH, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 445 F. 2d 385.

No. 71–669. UNITED STATES STEEL CORP. *v.* UNITED STATES; and

No. 71–673. UNITED STATES *v.* UNITED STATES STEEL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 520.

No. 71–670. SUNNY HILL FARMS DAIRY CO., INC. *v.* BUTZ, SECRETARY OF AGRICULTURE. C. A. 8th Cir. Certiorari denied. Reported below: 446 F. 2d 1124.

No. 71–671. WESTWOOD CHEMICAL, INC. *v.* OWENS-CORNING FIBERGLAS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 445 F. 2d 911.

No. 71–676. COLEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–677. WILCOX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 1131.

No. 71–681. O'BRIEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 643.

No. 71–682. MICHIGAN *v.* RANES. Sup. Ct. Mich. Certiorari denied. Reported below: 385 Mich. 234, 188 N. W. 2d 568.

No. 71–684. CITY OF COLUMBUS ET AL. *v.* BOWER ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 27 Ohio St. 2d 7, 271 N. E. 2d 860.

No. 71–686. BLANKENSHIP, ATTORNEY GENERAL OF OKLAHOMA, ET AL. *v.* OKLAHOMA EX REL. WILSON. C. A. 10th Cir. Certiorari denied. Reported below: 447 F. 2d 687.

No. 71–687. SILVA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 449 F. 2d 145.

No. 71–688. LADUCA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–689. PENNSYLVANIA ET AL. *v.* BAKER ET AL., TRUSTEES IN REORGANIZATION. C. A. 3d Cir. Certiorari denied. Reported below: 446 F. 2d 1109.

No. 71–690. ANDERSON ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 447 F. 2d 833.

No. 71–693. REYNOLDS ET AL. *v.* TEXAS GULF SULPHUR CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 446 F. 2d 90.

No. 71–694. LOUISIANA STATE DEPARTMENT OF HIGHWAYS *v.* DARDAR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 952.

No. 71–695. SILVERMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 1341.

No. 71–696. UTICA SQUARE NATIONAL BANK OF TULSA *v.* WOODSON, TRUSTEE. C. A. 10th Cir. Certiorari denied. Reported below: 447 F. 2d 241.

No. 71–698. EVANS *v.* DEPARTMENT OF TRANSPORTATION. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 821.

No. 71–699. PONDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 444 F. 2d 816.

No. 71–700. PAIEWONSKY *v.* PAIEWONSKY. C. A. 3d Cir. Certiorari denied. Reported below: 446 F. 2d 178.

No. 71–704. SCHANBARGER *v.* KELLOGG ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 35 App. Div. 2d 902, 315 N. Y. S. 2d 1013.

No. 71–706. BUCKLEY ET AL. *v.* GIBNEY, DEPUTY DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 1305.

No. 71–707. ARIZONA STATE DEPARTMENT OF PUBLIC WELFARE *v.* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 2d 456.

No. 71–710. SCHARFMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 1352.

No. 71–712. BRIDGES ET AL. *v.* DAVIS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 970 and 445 F. 2d 1401.

No. 71–719. BRADLEY LUMBER CO., INC. *v.* SHARPE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 446 F. 2d 152.

No. 71–721. FREEMAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 71–722. AUSTIN *v.* BERRY BROTHERS OIL FIELD SERVICE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 887.

No. 71–727. REGISTER ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 124 Ga. App. 136, 183 S. E. 2d 68.

No. 71–724. SKLAROFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 77.

No. 71–725. SCHOOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 1312.

No. 71–731. THOMAS, SHERIFF, ET AL. *v.* MORGAN. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 1356.

No. 71–733. ALLEN ET UX. *v.* STATE BOARD OF EDUCATION OF NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 447 F. 2d 960.

No. 71–736. DRISCOLL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 449 F. 2d 894.

No. 71–742. GOULD ET UX. *v.* AMERICAN WATER WORKS SERVICE CO., INC., ET AL. Super. Ct. N. J. Certiorari denied. Reported below: See 59 N. J. Super. 268, 281 A. 2d 530.

No. 71–743. LOCTITE CORP. *v.* BROADVIEW CHEMICAL CORP. C. A. 2d Cir. Certiorari denied.

No. 71–750. WOLKOMIR ET AL. *v.* FEDERAL LABOR RELATIONS COUNCIL ET AL. C. A. D. C. Cir. Certiorari denied.

No. 71–752. THOMAS *v.* OHIO. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 71–753. AMERICAN EXPORT ISBRANDTSEN LINES, INC. *v.* SUN SHIPBUILDING & DRY DOCK CO. C. A. 3d Cir. Certiorari denied. Reported below: 449 F. 2d 1267.

No. 71–761. THOMPSON *v.* BOARD OF COMMISSIONERS OF OAK BROOK PARK DISTRICT OF DU PAGE COUNTY. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 132 Ill. App. 2d 178, 268 N. E. 2d 570.

No. 71–762. EDWARD HINES LUMBER CO. *v.* CENTEX-WINSTON CORP. C. A. 7th Cir. Certiorari denied. Reported below: 447 F. 2d 585.

No. 71–764. SCOTT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 581.

No. 71–768. WILLIAMS ET UX. *v.* DILL ET AL. C. A. 5th Cir. Certiorari denied.

No. 71–774. BROCKSTEIN ET AL., DBA CHURCH AVENUE POULTRY *v.* NATIONWIDE MUTUAL INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 987.

No. 71–778. HERRIMAN ET AL. *v.* MIDWESTERN UNITED LIFE INSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 450 F. 2d 999.

No. 71–779. DOW *v.* CONNELL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 448 F. 2d 763.

No. 71–780. JOHNSON *v.* DENNIS, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES. Sup. Ct. Neb. Certiorari denied. Reported below: 187 Neb. 95, 187 N. W. 2d 605.

No. 71–781. COOK INDUSTRIES, INC. *v.* C. ITOH & CO. (AMERICA), INC. C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 106.

No. 71–782. SMITH, SUPERINTENDENT OF INSURANCE, ET AL. *v.* OHIO VALLEY INSURANCE CO. ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 27 Ohio St. 2d 268, 272 N. E. 2d 131.

No. 71–794. JOHNSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 269 N. E. 2d 879.

No. 71–785. MARIEMONT, INC. *v.* MASHETER, DIRECTOR OF HIGHWAYS. Sup. Ct. Ohio. Certiorari denied.

No. 71–795. SOUTHERN RAILWAY CO. *v.* CITY OF MORRISTOWN. C. A. 6th Cir. Certiorari denied. Reported below: 448 F. 2d 288.

No. 71–802. BARBARA *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 449 F. 2d 1235.

No. 71–804. WOLFF *v.* KORHOLZ ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 449 F. 2d 82.

No. 71–808. FLUOR WESTERN, INC. *v.* G & H OFFSHORE TOWING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 35.

No. 71–811. MARKS *v.* DEMOCRATIC PARTY OF THE UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 71–820. GENERAL MOTORS CORP. *v.* JENKINS. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 377.

No. 71–823. JORGENSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 451 F. 2d 516.

No. 71–825. ENRESCO, INC., ET AL. *v.* VALMONT INDUSTRIES, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 446 F. 2d 1193.

No. 71–835. GIACALONE *v.* LUCAS, SHERIFF. C. A. 6th Cir. Certiorari denied. Reported below: 445 F. 2d 1238.

No. 71–837. ROPER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: —— Ill. App. 2d ——, 272 N. E. 2d 667.

No. 71–841. INDIANA HARBOR BELT RAILROAD CO. ET AL. *v.* PUBLIC SERVICE COMMISSION OF INDIANA ET AL. App. Ct. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 263 N. E. 2d 292.

No. 71–843. COUNTY OF WAYNE ET AL. *v.* JUDGES FOR THE THIRD JUDICIAL CIRCUIT OF MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 386 Mich. 1, 190 N. W. 2d 228.

No. 71–845. MARTIN OIL SERVICE, INC. *v.* ILLINOIS DEPARTMENT OF REVENUE. Sup. Ct. Ill. Certiorari denied. Reported below: 49 Ill. 2d 260, 273 N. E. 2d 823.

No. 71–848. TEDESCO *v.* CINCINNATI GAS & ELECTRIC CO. C. A. 6th Cir. Certiorari denied. Reported below: 448 F. 2d 332.

No. 71–856. SECURITY SAVINGS & LOAN ASSN. ET AL. *v.* WESTINGHOUSE CREDIT CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 447 F. 2d 387.

No. 71–877. SMITH *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 111 N. H. 249, 279 A. 2d 913.

No. 71–887. WILBUR-ELLIS CO. *v.* THE CAPTAYANNIS "S" ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 451 F. 2d 973.

No. 71–5242. CALLOWAY ET AL. *v.* LEEKE, CORRECTIONS DIRECTOR, ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 256 S. C. 167, 181 S. E. 2d 481.

No. 71–5384. CANTRELL *v.* CALIFORNIA ADULT AUTHORITY. Sup. Ct. Cal. Certiorari denied.

No. 71–5409. WAINMAN *v.* CLARK, SHERIFF, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 71–5371. BENNETT *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 256 S. C. 234, 182 S. E. 2d 291.

No. 71–5440. ROGERS *v.* ADAMS, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 71–5441. INMAN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 71–5466. MITCHELL *v.* IDEAL COLLECTION SERVICE, INC. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 71–5549. YOUNG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 446 F. 2d 30.

No. 71–5551. DENTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–5553. LAWTON *v.* TARR, NATIONAL DIRECTOR, SELECTIVE SERVICE SYSTEM, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 446 F. 2d 787.

No. 71–5554. HOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 443 F. 2d 380.

No. 71–5556. NEAL *v.* GEORGIA ET AL. C. A. 5th Cir. Certiorari denied.

No. 71–5557. AUSTIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–5559. WILLIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 963.

No. 71–5561. WAGGONER *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 71–5563. MAGEE *v.* REAGAN, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 71–5566. RIDGILL *v.* OTIS, ACTING WARDEN. C. A. 2d Cir. Certiorari denied.

No. 71–5568. BRYAN *v.* KURCEVICH, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 71–5569. HAGELBERGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 279.

No. 71–5573. SCOTT *v.* FIELD, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 71–5574. WADE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 15 Cal. App. 3d 16, 92 Cal. Rptr. 750.

No. 71–5575. EVANS *v.* EVANS ET AL. Sup. Ct. N. C. Certiorari denied. Reported below: 279 N. C. 394, 183 S. E. 2d 242 and 245.

No. 71–5576. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–5578. BATTLE *v.* MOSELEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 71–5579. DIGGS *v.* DUNNE ET AL. Sup. Ct. Ill. Certiorari denied.

No. 71–5584. OSBORN *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 71–5586. RUIZ *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 811.

No. 71–5589. SANCHEZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 204.

No. 71–5588. TARLTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5592. ORTIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 164.

No. 71–5593. RAY *v.* FOREMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 441 F. 2d 1266.

No. 71–5594. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 448 F. 2d 250.

No. 71–5595. FAULKNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 447 F. 2d 869.

No. 71–5596. NEAL *v.* AMERICAN VETERANS COMMITTEE. C. A. 5th Cir. Certiorari denied.

No. 71–5597. OSKINS *v.* COINER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 71–5598. ROZENFELD *v.* NEW YORK BOARD OF PAROLE. C. A. 2d Cir. Certiorari denied.

No. 71–5600. TRUDO *v.* UNITED STATES; and
No. 71–5612. TATRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 649.

No. 71–5602. ZIMMERMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–5603. HUNTER *v.* CITY SOLICITOR OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 444 F. 2d 1395.

No. 71–5604. COHEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 448 F. 2d 654.

No. 71–5606. WILLIAMS *v.* ROGERS, SECRETARY OF STATE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 513.

No. 71–5607. SPIVEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 448 F. 2d 390.

No. 71–5608. GUILE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 71–5613. LUMSDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 2d 154.

No. 71–5614. COLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 415.

No. 71–5615. SULLIVAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–5616. BOYD *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 206 Kan. 597, 481 P. 2d 1015.

No. 71–5617. AGERS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 71–5618. FINISTER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 71–5619. SIMS *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 71–5620. ROBINSON, AKA LOPER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 448 F. 2d 715.

No. 71–5621. BASKIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 1057.

No. 71–5622. GAINES ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 186.

No. 71–5623. ANDERSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 448 F. 2d 1379.

No. 71–5626. CALABRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 885.

No. 71–5627. MCDONALD *v.* WELLONS ET AL. C. A. 6th Cir. Certiorari denied.

No. 71–5628. JACKSON, AKA ROBBINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 281.

No. 71–5629. JOHNSON *v.* SALISBURY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 448 F. 2d 374.

No. 71–5630. DIROSA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 448 F. 2d 863.

No. 71–5631. SCOTT *v.* HILL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 449 F. 2d 634.

No. 71–5632. MEMOLI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 2d 160.

No. 71–5634. WHITEHEAD *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 71–5635. JOHNSON *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 71–5636. MOSCATELLO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 450 F. 2d 985.

No. 71–5637. UNDERWOOD *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 470 S. W. 2d 485.

No. 71–5639. POSS *v.* SMITH, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 228 Ga. 168, 184 S. E. 2d 465.

No. 71–5640. FITZGERALD *v.* CIVIL SERVICE COMMISSION OF RADNOR TOWNSHIP. Super. Ct. Pa. Certiorari denied.

No. 71–5641. CARTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 448 F. 2d 1245.

No. 71–5642. FOUNTAIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 629.

No. 71–5643. CASELLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 449 F. 2d 277.

No. 71–5644. EDWARDS *v.* FISHMAN. C. A. 7th Cir. Certiorari denied.

No. 71–5646. BELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–5649. COLABELLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 1299.

No. 71–5650. NORTHERN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 71–5651. TREVINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 45.

No. 71–5653. PRESSLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–5654. WINKFIELD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 71–5655. OVERTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 448 F. 2d 1381.

No. 71–5658. SARRAMEDA *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied.

No. 71–5659. BROOKS ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 449 F. 2d 1263.

No. 71–5660. FARRIES *v.* PARKER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 71–5661. KELSEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 71–5662. GRAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5663. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 448 F. 2d 1280.

No. 71–5664. BUCHANAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 471 S. W. 2d 401.

No. 71–5665. EARLES *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–5667. AVERY, AKA KENYATTA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 447 F. 2d 978.

No. 71–5668. SERRANO *v.* HOCKER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 444 F. 2d 1093.

No. 71–5669. WRIGHT *v.* BATESON, INSURANCE COMMISSIONER. Ct. App. Ore. Certiorari denied. Reported below: 5 Ore. App. 628, 485 P. 2d 641.

No. 71–5670. ABARCA-ESPINOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 440 F. 2d 1354.

No. 71–5673. JENNINGS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 132 Ill. App. 2d 147, 267 N. E. 2d 511.

No. 71–5674. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 169.

No. 71–5676. YOUNG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5678. BULLOCK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5680. MURPHY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5681. MCKILLOP *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5684. POWELEIT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5688. WOODARD *v.* UNITED STATES; and
No. 71–5727. COLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 194.

No. 71–5689. NACHBAUR *v.* HERMAN. C. A. 2d Cir. Certiorari denied.

No. 71–5691. HUFFMAN *v.* MOORE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–5692. BROWN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–5694. HUNTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 156.

No. 71–5695. PICKING *v.* STATE FINANCE CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 450 F. 2d 881.

No. 71–5696. TEAGUE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5699. ALKES *v.* U. S. BOARD OF PAROLE ET AL. C. A. 10th Cir. Certiorari denied.

No. 71–5698. CARTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 144 U. S. App. D. C. 193, 445 F. 2d 669.

No. 71–5700. HARRIS *v.* UNITED STATES; and
No. 71–5717. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5702. WAUGH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5703. SMITH ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 312.

No. 71–5704. ROLLINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5705. TROY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 358.

No. 71–5706. HEARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5708. LUSTMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 13 Cal. App. 3d 278, 91 Cal. Rptr. 548.

No. 71–5712. YOUNG *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 71–5715. BARTLETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 700.

No. 71–5716. WION *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 71–5718. BECKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 156.

No. 71–5721. OLLER *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 71–5724. AMATO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–5725. MARRERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 373.

No. 71–5728. WELP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 446 F. 2d 867.

No. 71–5732. ENGLAND *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–5733. COLEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 70–272. KATZ ET AL. *v.* MCAULAY ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 438 F. 2d 1058.

No. 71–183. AGUA CALIENTE BAND OF MISSION INDIANS ET AL. *v.* COUNTY OF RIVERSIDE, CALIFORNIA. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 442 F. 2d 1184.

No. 71–659. DEVILLIERS *v.* ATLAS CORP. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 799.

No. 71–661. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 1376.

No. 71–680. FERGUSON, U. S. DISTRICT JUDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 169.

No. 71–683. INSURANCE COMPANY OF NORTH AMERICA *v.* CONTINENTAL OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 449 F. 2d 1209.

No. 71–714. FARINAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 1334.

No. 71–723. MEISTER *v.* DALTON. Sup. Ct. Wis. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 52 Wis. 2d 173, 188 N. W. 2d 494.

No. 71–748. KANE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 450 F. 2d 77.

No. 71–755. TARABOCCHIA *v.* ZIM ISRAEL NAVIGATION CO., LTD. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 1375.

No. 71–5548. MUNDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 441 F. 2d 1165.

No. 71–5555. UPSHAW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 1218.

No. 71–741. MESSENGER *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 4, ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5562. HALL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 114.

No. 71–5565. HUTCHINGS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 466 S. W. 2d 584.

No. 71–5599. WHEELER *v.* WARDEN, LEAVENWORTH PENITENTIARY. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5633. OBA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 892.

No. 71–5638. MURRAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 452 F. 2d 503.

No. 71–5683. NORDLOF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5697. POWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 449 F. 2d 706.

No. 71–654. LOVISI *v.* VIRGINIA. Sup. Ct. Va. Motion of respondent to dispense with printing brief granted. Certiorari denied.

No. 71–705. GALVESTON CITY CO. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 446 F. 2d 1030.

No. 71–713. VIRGINIA IMPRESSION PRODUCTS CO., INC. *v.* SCM CORP. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 448 F. 2d 262.

No. 71–717. KROZAK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 71–751. BOARD OF EDUCATION OF LITTLE ROCK SCHOOL DISTRICT ET AL. *v.* CLARK ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 449 F. 2d 493.

No. 71–729. SHEPPARD *v.* WASHINGTON. Ct. App. Wash. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–744. ADDONIZIO *v.* UNITED STATES;
No. 71–745. LAMORTE *v.* UNITED STATES;
No. 71–754. VICARO *v.* UNITED STATES; and
No. 71–756. BIANCONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 49.

MR. JUSTICE DOUGLAS, dissenting.

At the trial involved in these cases there was much evidence of corrupt practices by the administration of petitioner Addonizio during his tenure as mayor of Newark, New Jersey. But the question posed to the

jury below was not whether these petitioners had engaged in corrupt practices, but the narrower issue of whether they had entered into and executed a criminal agreement to extract kickbacks from public contractors through threats of physical harm or economic ruin in violation of 18 U. S. C. § 1951.[1] Although the petitioners were charged with 65 substantive acts of coercive extraction of kickbacks, the key issue in the trial was who, if anyone, had conspired to commit these acts. Absent a finding that such a confederation had been formed, most of the evidence which damaged the petitioners could not have been introduced at all inasmuch as this evidence was hearsay admitted provisionally under the so-called coconspirator exception. That the jury found a conspiracy to have existed, however, was under the circumstances of this trial the unsurprising and virtually inevitable result of the many disabilities imposed upon an accused by the ordeal of a multi-defendant conspiracy prosecution.[2]

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[1] Section 1951 provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

. . . . . .

"(b)(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

[2] The potential for abuse of multi-defendant conspiracy proceedings has been discussed in O'Dougherty, Prosecution and Defense Under Conspiracy Indictments, 9 Brooklyn L. Rev. 263 (1940); Note, Developments in the Law: Criminal Conspiracy, 72 Harv. L. Rev. 922, 983 (1959); Wessel, Procedural Safeguards for the Mass Conspiracy Trial, 48 A. B. A. J. 628 (1962); Goldstein, The *Krulewitch* Warning: Guilt By Association, 54 Geo. L. J. 133 (1965).

Mr. Justice Jackson catalogued many of these disabilities in his well-known concurrence in *Krulewitch* v. *United States*, 336 U. S. 440, 446 (1949), reversing a conspiracy conviction, where he concluded that the prevailing "loose practice as to [the conspiracy] offense constitutes a serious threat to fairness in our administration of justice." He criticized the tendency of courts to dispense "with even the necessity to infer any definite agreement, although that is the gist of the offense." *Id.*, at 452. As to the procedural evils of this device he found that the risk to a codefendant of guilt by association was abnormally high:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other." *Id.*, at 454.

Mr. Justice Jackson also regretted the wide leeway that prosecutors enjoyed in the broad scope of evidence admissible to prove conspiracy (and consequently to prove substantive acts as well). Under conspiracy law, the declarations and acts of any confederate in furtherance of the joint project are attributable to and admissible against all of its participants. This is true even if the declarant is not available for cross-examination. Moreover, such statements are admissible "subject to connection" by the prosecutor later in the trial. At the close of the Government's case, for example, the judge may believe that the Government failed to present a jury question as to a defendant's participation in a

collective criminal plot. In such a case, the judge must ask the jury to disregard the provisionally admitted hearsay. Obviously, however, it will be difficult in a lengthy trial (such as this one filling 5,500 pages of transcript) for jurors to excise the stricken testimony from their memories. In the alternative case where the judge believes that a jury question has been presented as to a defendant's participation in a criminal enterprise, the jury is permitted to consider the provisionally admitted matter in determining whether or not a defendant was a conspirator. In other words, the jury is allowed to assume its ultimate conclusion. Mr. Justice Jackson was particularly sensitive to the abuse potential in this vicious logic:

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumenthal* v. *United States*, 332 U. S. 539, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore* v. *Baltimore & Ohio R. Co.*, 167 F. 2d 54." *Id.*, at 453.

There are other disabilities. Often testimony will be receivable only against a particular codefendant, yet it may also inculpate another accused such as where (a) a codefendant "opens the door" to prejudicial evidence by placing his reputation in issue,[3] (b) a codefendant wants to place before the jury information which is helpful to him but is damaging to other defendants, or (c) the Government desires to offer evidence admissible against less than all of the codefendants. Cautionary instructions, of course, are routinely given where such circumstances arise but we have often recognized the inability of jurors to compartmentalize information according to defendants. *Bruton* v. *United States*, 391 U. S. 123 (1968). See also *Jackson* v. *Denno*, 378 U. S. 368, 388 (1964); *Krulewitch* v. *United States*, *supra*, at

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[3] An example of a single defendant's opening the door to prosecution rebuttal prejudicial to other defendants was presented in the famous *Apalachin* trial (*United States* v. *Bufalino*, 285 F. 2d 408 (CA2 1960)):

"The reputation of the Apalachin delegates and the character of the meeting had been the subject of much public comment during the two years before trial. Many reports had described the lengthy criminal records of some of the delegates, had characterized the meeting as a convention of the 'Mafia' and had given other lurid details of what had occurred. None of this evidence was considered sufficiently material to the charge to warrant its introduction at trial.

"Toward the end of the trial, one of the defendants placed his reputation squarely in issue. He called witnesses who testified to his excellent reputation for truth and veracity at the time of the trial.

"Ordinarily it would have been entirely proper to attempt to refute this testimony by cross-examining with reference to the earlier publicity; the defendant himself had elsewhere complained about how much it had hurt his reputation. However, such evidence might have had equally serious adverse effects upon the nineteen co-defendants, who had done nothing to open the door against themselves." Wessel, Procedural Safeguards for the Mass Conspiracy Trial, *supra*, n. 2, at 631.

453 (quoted above). This shortcoming of the jury is compounded when, as here, the jury is also asked to digest voluminous testimony.

A victim of the multi-defendant conspiracy trial has fewer options for trial strategy than the ordinary defendant tried alone. Counsel may reluctantly give up the option of pointing the accusing finger at his client's codefendants in order to obtain similar concessions from other trial counsel. Counsel must also divert his preparation in part toward generating possible responses to evidence which may be admissible only against other codefendants. As for the defendant, he may be put to the choice of hiring less experienced counsel or less actively pursuing discovery or investigation because of the higher legal expenses imposed by longer joint trials. Furthermore, although an accused normally has "the right to present his own witnesses to establish a defense," *Washington* v. *Texas*, 388 U. S. 14, 19 (1967), an accused in a mass conspiracy trial may not put on his codefendants without their prior waivers of their absolute rights not to testify.[4]

All of these oppressive features were present in various degrees in this trial. But, in particular, the most onerous burden cast upon these petitioners was their inability to cross-examine each other as to comments which Government witnesses said they had heard them utter. The Court of Appeals recognized that "[t]here

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[4] Even at a severed trial of only one defendant, another alleged coconspirator may, if called to testify, invoke his privilege against self-incrimination. Where the severed trial is delayed until after the acquittal or finalized conviction of the witness, however, invocation of the privilege would be improper. In any event, even if the witness refused to answer questions, the defendant would at least obtain whatever inference of innocence might result from the apparent guilt of the witness.

was much testimony as to statements made by various co-conspirators during the course, and in furtherance of the conspiracy." 451 F. 2d 49, 71. For example, one important prosecution witness testified that he had been a contractor hired by the city administration and that one of the accused conspirators, "Tony Boy" Boiardo, had told him: "You pay me the 10% . . . I take care of the Mayor. I take care of the Council." (App. 2611a.) The lawyer for the former mayor, however, was not permitted to put Boiardo on the stand and to ask him whether Addonizio had, in fact, entered into an agreement with him to coerce kickbacks. This handicap of an accused is at war with the holdings of this Court that a defendant should be permitted to confront his accusers, especially where, as here, their declarations might have been purposely misleading or self-serving. *Pointer* v. *Texas,* 380 U. S. 400, 407 (1965); *Douglas* v. *Alabama,* 380 U. S. 415 (1965); *Brookhart* v. *Janis,* 384 U. S. 1 (1966); *Bruton* v. *United States, supra; Barber* v. *Page,* 390 U. S. 719 (1968); *Roberts* v. *Russell,* 392 U. S. 293 (1968). *Dutton* v. *Evans,* 400 U. S. 74 (1970), is not inconsistent with this proposition. There the Court found that the hearsay was probably reliable. "[T]he circumstances under which [the declarant] made the statement were such as to give reason to suppose that [he] did not misrepresent [his coconspirator's] involvement in the crime." *Id.,* at 89. On the other hand, involved here were declarants, as mentioned earlier, who might have been motivated to misrepresent the roles of other parties in order to induce contractors, such as Rigo (the Government's key witness), to make kickbacks. Moreover, in *Dutton* the hearsay was "of peripheral significance at most," whereas here much of the case against the petitioners, as the

Court of Appeals pointed out, was admitted under the coconspirator exception to the hearsay rule.[5]

In addition, the petitioners were deprived of the right to cross-examine codefendant Gordon (who is not one of the petitioners). He had testified at the prior grand jury proceeding and that testimony was introduced at trial by the Government to corroborate the story of the Government's key witness, Rigo, as to various kickback transactions. The circumstances at trial were substantially similar to those involved in *Bruton* except that Gordon's grand jury remarks did not directly mention his codefendants. Normally, that difference would be sufficient to support the lower court's finding that *Bruton* was inapposite but for the fact that the Government's case against all of the defendants turned upon Rigo's credibility. On cross-examination of Rigo, the codefendants had relentlessly attacked his credibility. But when the Government introduced the grand jury transcript in rebuttal, the defense challenge was completely terminated because Gordon, who was also on trial, could not be called to the stand. The judge, of course, gave instructions to the jury to consider the impact of the transcript upon Rigo's credibility only when assessing Gordon's guilt, but it is doubtful that the jurors could faithfully adhere to the delicate logic that Rigo may have told the truth as to Gordon but

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[5] The *Dutton* plurality opinion found the coconspirator hearsay had played a minor role in the trial:

"In the trial of this case no less than 20 witnesses appeared and testified for the prosecution. Evans' counsel was given full opportunity to cross-examine every one of them. The most important witness, by far, was the eyewitness who described all the details of the triple murder and who was cross-examined at great length. Of the 19 other witnesses, the testimony of but a single one is at issue here." *Dutton* v. *Evans*, 400 U. S. 74, 87 (1970).

may have lied as to his codefendants. The contrary conclusion, to borrow from Mr. Justice Jackson, would be "unmitigated fiction." *Krulewitch* v. *United States, supra,* at 453.

In light of the claims of prejudice committed in this multi-defendant conspiracy trial, I would grant certiorari to consider whether the *extensive* reliance by the prosecutor on the coconspirator exception to the hearsay rule and the admission of the Gordon transcript deprived these petitioners of constitutional rights.

No. 71–888. WYMAN, COMMISSIONER OF NEW YORK DEPARTMENT OF SOCIAL SERVICES *v.* ALMENARES ET AL. C. A. 2d Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 453 F. 2d 1075.

No. 71–5547. MCCRAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: See 334 F. 2d 760.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner was found guilty of five violations of the Mann Act and sentenced to a total of 10 years—some of the sentences being consecutive and some concurrent. There is no doubt that petitioner transported the same woman to various cities over a period of a year for prostitution. There were five counts, two of which charged transportation in commerce of the named woman between designated cities for the purpose of prostitution. Each was an offense under 18 U. S. C. § 2421, which provides a fine of $5,000 or five years in prison, or both.[1]

[1] Section 2421 provides:

"Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to be-

Three of the five counts charged that petitioner persuaded, induced, enticed, or coerced this same woman "to go from one place to another" in interstate commerce for the purpose of prostitution, each count charging an offense under 18 U. S. C. § 2422 which carries a fine of $5,000 or five years in prison, or both.[2]

As a matter of semantics there is an offense under § 2421 whenever a person "transports" a woman for the illegal purpose and there is one under § 2422 when a

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come a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

"Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

[2] Section 2422 provides:

"Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

person "induces" a woman to move interstate for the purpose of prostitution. The two sections seem complementary. But there are two substantial questions:

First, can § 2422 be fragmented into a series of acts, each being described as an inducement to the same woman to move interstate to live the life of a prostitute? Or within the meaning of the Act is she "induced" only once in the series?

Second, where, as here, petitioner and the woman move around the country in one continuous enterprise, is there a separate offense each time they cross a state line?

In *Bell* v. *United States*, 349 U. S. 81, we held that where a man for purposes of prostitution took two women across a state line on the same trip and in the same vehicle, he committed only a single offense. We said:

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Id.*, at 83.

A man who induces a woman to go on a prostitution tour certainly violates the Act. But what kind of inducement fits the Act? Here this woman, a divorcee, merely got instruction from petitioner as to how to work a cocktail lounge and bar. The legislative history of the Act shows a purpose "to prevent panderers and procurers from compelling . . . women and girls against their will and desire to enter and continue in a life of prostitution." S. Rep. No. 886, 61st Cong., 2d Sess., 10 (1910). It was supposed to reach those "who, by means of force and restraint, compel their victims to practice prostitution." *Id.*, at 11. Examples were given of the use of "[l]iquor, trickery, deceit, fraud and the use of force" by a procurer "to place the girl under his power." *Ibid.* For maintaining a regime of prostitution, the Report said,

"the procurer has [*sic*] resort to physical violence and the maintenance of a system of surveillance which makes her, to all intents and purposes, a prisoner." *Id.*, at 12. There was no such force or compulsion in the present case.

The Report makes plain that the Act "does not attempt to regulate the practice of voluntary prostitution" or to displace any laws of the States. *Id.*, at 10.

Since at best this case is a marginal one, should not the Act be strictly, not loosely, construed? Since petitioner and the woman (plus petitioner's wife) were on a year's tour, do the offenses multiply every time a state line is crossed or should the enterprise be considered as one entity? Or, where there is but one inducement, is there not, so far as § 2422 is concerned, but one offense?

These are questions on which we should have briefs and argument.

The Court has not been consistent in its approach to this Act, as a comparison of *Caminetti* v. *United States*, 242 U. S. 470, with *Bell* v. *United States*, *supra*, makes plain. The present case of voluntary prostitution is an appropriate vehicle for a re-examination of the judicial decisions in this area.

No. 71–5591. LEIGHTON *v.* NEIL, WARDEN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL are of the opinion that certiorari should be granted. Reported below: 443 F. 2d 1183.

No. 71–5675. MOONEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 71–5687. WRIGHT *v.* UNITED STATES. C. A D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 146 U. S. App. D. C. 126, 449 F. 2d 1355.

Rehearing Denied

No. 70–90. SCHILB ET AL. *v.* KUEBEL, 404 U. S. 357;

No. 70–315. RESOLUTE INSURANCE CO. ET AL. *v.* SEVENTH JUDICIAL DISTRICT COURT OF OKLAHOMA COUNTY ET AL., 404 U. S. 997;

No. 71–254. WESTMORELAND *v.* MISSISSIPPI, 404 U. S. 1038;

No. 71–463. KADANS *v.* COLLINS, CHIEF JUSTICE, SUPREME COURT OF NEVADA, ET AL., 404 U. S. 1007;

No. 71–518. COUCH, ADMINISTRATRIX *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO., 404 U. S. 1025;

No. 71–545. UNITED STATES STEEL CORP. *v.* BLAIR, 404 U. S. 1018;

No. 71–5171. CUNNINGHAM *v.* WINGO, WARDEN, 404 U. S. 1064;

No. 71–5326. FELAN *v.* UNITED STATES, 404 U. S. 978;

No. 71–5380. GALDEIRA ET AL. *v.* RICHARDSON ET AL., 404 U. S. 993;

No. 71–5394. SHAPPELL *v.* MARTIN-MARIETTA CORP., 404 U. S. 1002;

No. 71–5479. TODARO *v.* UNITED STATES, 404 U. S. 1040;

No. 71–5482. MCCRAY *v.* UNITED STATES MARSHAL FOR THE DISTRICT OF KANSAS ET AL., 404 U. S. 1040; and

No. 71–5524. LOGAN *v.* CORRECTIONAL SUPERINTENDENT, WALLKILL PRISON, 404 U. S. 1061. Petitions for rehearing denied.

No. 70–38. FEDERAL POWER COMMISSION *v.* FLORIDA POWER & LIGHT CO., 404 U. S. 453. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 70–5025. HAINES *v.* KERNER ET AL., 404 U.S. 519. Petition for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 70–193. RUSSO *v.* UNITED STATES, 404 U. S. 1023. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Tenth Circuit during the period beginning March 13, 1972, and ending March 15, 1972, and for such additional time in advance thereof to prepare for the trial of cases, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

FEBRUARY 23, 1972

Dismissals Under Rule 60

No. 70–95. BOARD OF ELECTIONS FOR THE DISTRICT OF COLUMBIA ET AL. *v.* LESTER ET AL. Appeal from D. C. D. C. dismissed under Rule 60 of the Rules of this Court. Reported below: 319 F. Supp. 505.

No. 71–6014. LEPISCOPO *v.* UNITED STATES. C. A. 9th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

FEBRUARY 28, 1972

Affirmed on Appeal

No. 71–765. NORTHERN NATURAL GAS CO. *v.* WILSON ET AL. Affirmed on appeal from D. C. Kan. Reported below: 340 F. Supp. 1126.

No. 71–5464. KIRK *v.* MCMEEN ET AL. Affirmed on appeal from D. C. N. D. Iowa. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 71–5743. TORRES ET AL. *v.* NEW YORK STATE DEPARTMENT OF LABOR ET AL. Affirmed on appeal from D. C. S. D. N. Y. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would note probable jurisdiction and reverse. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970). Reported below: 333 F. Supp. 341.

Appeals Dismissed

No. 70–56. GILLIGAN, GOVERNOR OF OHIO, ET AL. *v.* SWEETENHAM ET AL. Appeal from D. C. S. D. Ohio [probable jurisdiction noted, 401 U. S. 991] dismissed as moot. Reported below: 318 F. Supp. 1262.

No. 71–828. DETROIT POLICE OFFICERS ASSN. ET AL. *v.* CITY OF DETROIT. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 385 Mich. 519, 190 N. W. 2d 97.

No. 71–855. WILLIS *v.* STATE BOARD OF CONTROL ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question.

No. 71–880. HAYNES ET AL. *v.* LINDER ET AL. Appeal from Sup. Ct. Mo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 472 S. W. 2d 412.

Miscellaneous Orders

No. A–871. FRASER & JOHNSTON CO. *v.* LODGE 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO. C. A. 9th Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 70–74. PIPEFITTERS LOCAL UNION NO. 562 ET AL. *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, 402 U. S. 994.] Motion of petitioners for leave to file supplemental brief after argument granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 70–220. CAPLIN, TRUSTEE *v.* MARINE MIDLAND GRACE TRUST CO. OF NEW YORK. C. A. 2d Cir. [Certiorari granted, 404 U. S. 982.] Motion of the Solicitor General for leave to participate in oral argument on behalf of the Securities and Exchange Commission granted and a total of 15 minutes allotted for that purpose. Counsel for respondent allotted 15 additional minutes for oral argument.

No. 40, Orig. PENNSYLVANIA *v.* NEW YORK ET AL. Motion of American Express Co. for leave to file a brief as *amicus curiae* denied. [For earlier orders herein, see, *e. g.*, 401 U. S. 931.]

No. 70–250. CARLESON, DIRECTOR, DEPARTMENT OF SOCIAL WELFARE, ET AL. *v.* REMILLARD ET AL. Appeal from D. C. N. D. Cal. [Probable jurisdiction noted, 404 U. S. 1013.] Motion of appellee Remillard for appointment of counsel granted. It is ordered that Carmen L. Massey, of Richmond, California, be, and she is hereby, appointed to serve as counsel for appellee Remillard in this case.

No. 70–5015. ARGERSINGER *v.* HAMLIN, SHERIFF. Sup. Ct. Fla. [Certiorari granted, 401 U. S. 908.] Motion for leave to cite supplemental authority granted.

No. 70–5061. KIRBY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. [Certiorari granted, 402 U. S. 995.] Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* granted and a total of 15 minutes allotted for that purpose. Counsel for petitioner allotted 15 additional minutes for oral argument.

No. 70–5276. MUREL ET AL. *v.* BALTIMORE CITY CRIMINAL COURT ET AL. C. A. 4th Cir. [Certiorari granted, 404 U. S. 999.] Motion to dispense with printing *amicus curiae* brief of Prison Research Council of the University of Pennsylvania Law School granted.

No. 71–5097. HUFFMAN *v.* BOERSEN. Sup. Ct. Neb. [Certiorari granted, 404 U. S. 990.] Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 71–5103. MORRISSEY ET AL. *v.* BREWER, WARDEN, ET AL. C. A. 8th Cir. [Certiorari granted, 404 U. S. 999.] Motion to dispense with printing *amicus curiae* brief of James H. Russell granted.

No. A–797 (71–994). EPSTEIN *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN are of the opinion that the stay should be granted. Reported below: 37 App. Div. 2d 333, 325 N. Y. S. 2d 657.

No. 71–5470. BEASLEY *v.* UNITED STATES;
No. 71–5707. SMITH *v.* MACGRUDER;
No. 71–5710. HORTON *v.* NORTH CAROLINA; and
No. 71–5711. ENLOW *v.* LASH, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71–5701. LAUCHLI *v.* POOS, U. S. DISTRICT JUDGE;
No. 71–5713. MOORE *v.* WHIPPLE, U. S. DISTRICT JUDGE; and
No. 71–5751. MCCRAY *v.* ARRAJ, U. S. DISTRICT JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 71–798. SILK *v.* KLEPPE, ADMINISTRATOR OF SMALL BUSINESS ADMINISTRATION. Motion to dispense with printing petition granted. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 71–873. UNITED STATES *v.* FALSTAFF BREWING CORP. ET AL. Appeal from D. C. R. I. Probable jurisdiction noted and case set for oral argument with No. 71–703 [*United States* v. *First National Bancorporation, Inc.*, probable jurisdiction noted, *ante*, p. 915]. Reported below: 332 F. Supp. 970.

No. 71–879. HEUBLEIN, INC. *v.* SOUTH CAROLINA TAX COMMISSION. Appeal from Sup. Ct. S. C. Probable jurisdiction noted. Reported below: 257 S. C. 17, 183 S. E. 2d 710.

Certiorari Granted

No. 71–857. EVCO, DBA EVCO INSTRUCTIONAL DESIGNS *v.* JONES, COMMISSIONER OF BUREAU OF REVENUE, ET AL. Ct. App. N. M. Certiorari granted. Reported below: 83 N. M. 110, 488 P. 2d 1214.

No. 71–858. RICCI *v.* CHICAGO MERCANTILE EXCHANGE ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 447 F. 2d 713.

No. 71–895. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL VAN LINES. C. A. 9th Cir. Certiorari granted. Reported below: 448 F. 2d 905.

No. 71–732. SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT *v.* BUSTAMONTE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 448 F. 2d 699.

No. 71–863. COLUMBIA BROADCASTING SYSTEM, INC. *v.* DEMOCRATIC NATIONAL COMMITTEE;

No. 71–864. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE ET AL.;

No. 71–865. POST-NEWSWEEK STATIONS, CAPITAL AREA, INC. *v.* BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE; and

No. 71–866. AMERICAN BROADCASTING COS., INC. *v.* DEMOCRATIC NATIONAL COMMITTEE. C. A. D. C. Cir. Certiorari granted. Cases consolidated and a total of two hours allotted for oral argument. Mandate of United States Court of Appeals for the District of Columbia Circuit issued on October 29, 1971, in these cases is hereby recalled and stayed pending the sending down of judgment of this Court. MR. JUSTICE DOUGLAS is of the opinion that stay should be denied. Reported below: 146 U. S. App. D. C. 181, 450 F. 2d 642.

No. 71–900. UNION OIL CO. OF CALIFORNIA *v.* THE SAN JACINTO ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 451 F. 2d 1369.

No. 71–586. NEIL, WARDEN *v.* BIGGERS. C. A. 6th Cir. Motion to use record in No. 237, October Term, 1967 [*Biggers* v. *Tennessee,* 390 U. S. 404] and motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions and petition. Reported below: 448 F. 2d 91.

Certiorari Denied. (See also No. 71–880, *supra.*)

No. 70–5405. CAPELLO *v.* GATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 71–730. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 1285.

No. 71–740. ALLEN, TRUSTEE IN BANKRUPTCY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 447 F. 2d 497.

No. 71–763. BRADSHAW ET AL. *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 4th Cir. Certiorari denied.

No. 71–769. MORNING TELEGRAPH, A DIVISION OF TRIANGLE PUBLICATIONS, INC. *v.* POWERS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 97.

No. 71–777. CLEVELAND ET AL. *v.* ILLINOIS BELL TELEPHONE CO. ET AL.; and

No. 71–807. AGRON *v.* ILLINOIS BELL TELEPHONE CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 449 F. 2d 906.

No. 71–800. COHEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 1224.

No. 71–788. ARMOUR & Co. *v.* LOCAL UNION No. 186, UNITED PACKINGHOUSE, FOOD & ALLIED WORKERS, AFL–CIO. C. A. 6th Cir. Certiorari denied. Reported below: 446 F. 2d 610.

No. 71–789. JACOBS *v.* UNITED STATES; and
No. 71–796. KASTENBAUM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 530.

No. 71–810. CHICKEN DELIGHT, INC., ET AL. *v.* SIEGEL ET AL.; and
No. 71–824. SIEGEL ET AL. *v.* CHICKEN DELIGHT, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 43.

No. 71–815. DIORIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 451 F. 2d 21.

No. 71–859. BRADFORD ET UX. *v.* THOMPSON ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 470 S. W. 2d 633.

No. 71–872. JOHNSON ET AL. *v.* BOARD OF APPEALS AND REVIEW. Ct. App. D. C. Certiorari denied. Reported below: 282 A. 2d 566.

No. 71–885. COUNTY OF MIDDLESEX *v.* GEVYN CONSTRUCTION CORP. C. A. 1st Cir. Certiorari denied. Reported below: 450 F. 2d 53.

No. 71–894. UNITED STATES STEEL CORP. *v.* LAIRD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 216.

No. 71–904. GREAT FIDELITY INVESTMENT CO. ET AL. *v.* MARTIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 959.

No. 71–5094. BEATY ET AL. *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–5418. SPILLER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 71–5448. HAYNES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 468 S. W. 2d 375.

No. 71–5462. WHITMORE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 28 N. Y. 2d 826, 270 N. E. 2d 893.

No. 71–5490. PETWAY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 71–5511. FARMER *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 445 F. 2d 5.

No. 71–5513. ROGERS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71–5734. HOAK ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 71–5736. WILLIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–5738. ACARINO *v.* MISHLER, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 2d Cir. Certiorari denied.

No. 71–5739. BARROW *v.* BOUNDS, CORRECTIONS DIRECTOR. C. A. 4th Cir. Certiorari denied.

No. 71–5741. SINCLAIR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5746. GRINDSTAFF *v.* WARDEN, LEAVENWORTH PENITENTIARY. C. A. 10th Cir. Certiorari denied.

No. 71–5747. ROSENBERG *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 445 F. 2d 613.

No. 71–5748. WIMBERLEY *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 7th Cir. Certiorari denied.

No. 71–5749. SASKO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 71–5750. BAYS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 977.

No. 71–5752. LEWIS *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. C. A. D. C. Cir. Certiorari denied.

No. 71–5754. BOYD *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 148.

No. 71–5756. HALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 1206.

No. 71–5757. FERGUSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 71–5758. LANGLEY ET AL. *v.* TURNER, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 71–5759. HIDALGO *v.* PURCELL ET AL. Ct. App. Ore. Certiorari denied. Reported below: 5 Ore. App. 513, 488 P. 2d 858.

No. 71–5760. YANICH *v.* MUMMERT, SHERIFF. C. A. 9th Cir. Certiorari denied.

No. 71–5763. OVERTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–5764. NOEL *v.* UNITED STATES; and
No. 71–5774. JONES ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 1057.

No. 71–5765. CHICQUELO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 146 U. S. App. D. C. 381, 452 F. 2d 1310.

No. 71–486. MONGER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied, it appearing that judgment of the Supreme Court of Florida rests upon an adequate state ground. Reported below: 249 So. 2d 433.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur, dissenting.

Petitioner was employed in a newsstand which sold "girlie" magazines. He was charged with the sale of two allegedly obscene magazines—Body Shop and The Erotic Cinema—in violation of Florida's obscenity statute [1] and, on November 3, 1970, the jury returned verdicts of guilty on both counts. On January 12, 1971, the trial court orally pronounced its judgment of guilty and imposed a sentence of either a $1,000 fine or six months' imprisonment on each count, plus costs. That same day, petitioner filed his notice of appeal and a motion for supersedeas. On January 18, the trial court entered its written order *nunc pro tunc* January 12. This order recited that petitioner's notice of appeal was filed after the entry of judgment. Because he was challenging the constitutionality of a state statute, petitioner's appeal was transferred by the District Court of Appeal of Florida, First District, to the Florida Supreme Court.

Respondent then made a motion to dismiss the appeal because "the notice of appeal . . . was filed prior to entry of either judgment or sentence." Respondent's argument was apparently founded upon the fact that the notice of appeal was filed after the oral entry of judgment but before the written *nunc pro tunc* order. In a

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[1] Fla. Stat. Ann. § 847.011. This statute was held unconstitutional by a three-judge district court, *Meyer* v. *Austin*, 319 F. Supp. 457, and an appeal from that judgment is presently pending before this Court, No. 70–35, *Austin* v. *Meyer*.

4–3 decision, the Florida Supreme Court dismissed the appeal. Justice Ervin dissented, saying:

> "I think it altogther *too technical* to refuse to give credence to notices of appeals filed ante to judgments or sentences being reduced to writing and placed in a minute or judgment book after they have been pronounced in open court and reflected in the minutes. A person convicted should not be delayed in taking an appeal or commencing service of sentence. A notice of appeal is not necessarily invalid because it antedates a written judgment. It picks up when the judgment is entered unless the state can show some prejudice by early filing of the notice, which it can't in this case."

Petitioner now contends that it is a denial of due process to dismiss a criminal defendant's only appeal for failing to meet a procedural technicality where the failure does not prejudice the State.[2] Alternatively, petitioner argues that the basis of the dismissal by the Florida Supreme Court was not an adequate and independent state ground which would bar this Court's review of his First Amendment claims. Respondent answers that the State's rules of appellate procedure are necessary "to avoid chaotic and haphazard appellate proceedings" and thus comport with the requirements of procedural due process. In any event, argues respondent, the judgment below rests upon an adequate state ground and thus is not within our certiorari jurisdiction. 28 U. S. C. § 1257 (3).

The Federal Constitution contains no requirement that a State provide appellate courts or even that there be a right to appellate review. *Griffin* v. *Illinois*, 351 U. S.

[2] Petitioner argues that the notice of appeal was filed January 12 in order to prevent the trial court from increasing the sentence it had imposed orally.

12, 18; *McKane* v. *Durston*, 153 U. S. 684, 687–688. This is not to say, however, that once appellate review has been provided a State may deny it arbitrarily or capriciously without violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Douglas* v. *California*, 372 U. S. 353; *Burns* v. *Ohio*, 360 U. S. 252; *Griffin* v. *Illinois*, *supra*. A substantial constitutional question is presented, therefore, when federal rights secured by the First Amendment are rejected on the basis of procedural technicalities such as the one involved here. See *Daniels* v. *Allen*, 344 U. S. 443, 557–558 (Frankfurter, J., dissenting); *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 682; *Rogers* v. *Alabama*, 192 U. S. 226, 230–231; Hill, The Inadequate State Ground, 65 Col. L. Rev. 941, 959–962 (1965).

In my view, the basis of the dismissal in the Supreme Court of Florida is not an adequate and independent state ground sufficient to bar this Court's review of petitioner's First Amendment claims. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . [I]t is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way." *Davis* v. *Wechsler*, 263 U. S. 22, 24–25. Thus, the rule that this Court will not review decisions founded upon state grounds is subject to exception so that federal claims may properly be vindicated.

In *Rogers* v. *Alabama*, *supra*, for example, the state court had stricken from the record a motion on the ground that it was "prolix," but we nonetheless reached the federal question raised in that motion. We have similarly reached federal questions which had been avoided by state courts on the ground that the improper remedy had been used, *NAACP* v. *Alabama*, 357 U. S.

449; that the argument advanced had been too indefinite or was improperly presented for consideration by the state court, *Barr* v. *City of Columbia*, 378 U. S. 146; *NAACP* v. *Alabama*, 377 U. S. 288, 293–302; *Staub* v. *City of Baxley*, 355 U. S. 313, 318–320; *Lovell* v. *Griffin*, 303 U. S. 444, 449–450; that the state appellate court lacked jurisdiction because the appellant had failed to give opposing counsel the requisite opportunity to examine and correct the transcript, *Sullivan* v. *Little Hunting Park*, 396 U. S. 229; that a criminal defendant had not made timely objection to the admission of evidence, *Henry* v. *Mississippi*, 379 U. S. 443; or that the required certification of the state appeal had not been obtained, *Parrot* v. *Tallahassee*, 381 U. S. 129. See also R. Stern & E. Gressman, Supreme Court Practice 131–142 (4th ed. 1969); Hill, *supra;* Note, 74 Harv. L. Rev. 1375 (1961); Note, 62 Col. L. Rev. 822 (1962). In *Henry* v. *Mississippi*, *supra*, at 446–447, we summarized the effect of procedural irregularities in state proceedings upon the scope of this Court's review:

> "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, but also in cases involving state procedural grounds. But it is important to distinguish between state substantive grounds and state procedural grounds. Where the ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand. Under the view taken in *Murdock* [20 Wall. 590] of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of

state law. Thus, the adequate nonfederal ground doctrine is necessary to avoid advisory opinions.

"These justifications have no application where the state ground is purely procedural. A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." (Citations omitted.)

We then concluded "that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights." *Id.*, at 447–448.

I assume that Florida has a legitimate interest in foreclosing interlocutory appeals in order to avoid piecemeal litigation of criminal cases. That assumption, however, does not dispose of the present case because *Henry* requires that "every case" be considered on its own facts. Here, I can fathom no state interest which would be served by rejecting a notice of appeal filed after an oral pronouncement of judgment but before a written order. This is not a case where the orderly progress of the trial was disrupted by a dilatory interlocutory appeal or where an appeal was sought before some vital aspect of the trial was completed. Nor is this a case where the record on appeal was missing some formal document or pleading. Indeed, tellingly absent from the order of the Supreme Court of Florida

and the brief of the respondent is the assertion of any state interest which would have been served had the trial court's January 12 order been written instead of oral or had the petitioner waited until January 18 to file his formal notice of appeal. Under such circumstances, *Henry* v. *Mississippi* teaches that we are free to consider petitioner's federal claims.

I would grant the petition for a writ of certiorari and reverse and remand on *Redrup* v. *New York*, 386 U. S. 767.

No. 71–554. LIEPMAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–629. VALDEZ ET AL. *v.* BLACK ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 1071.

No. 71–772. MENNA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 982.

No. 71–791. ROMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 579.

No. 71–870. FEINLOWITZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 29 N. Y. 2d 176, 272 N. E. 2d 561.

No. 71–668. RIVERA *v.* UNITED STATES; and

No. 71–832. MARQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of these petitions. Reported below: 449 F. 2d 89.

No. 71–5365. FOSTER *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5505. BIVENS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 445 F. 2d 1064.

No. 71–5745. MACLEAN *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–672. UNITED STATES *v.* TWO HUNDRED AND ONE 50-POUND BAGS OF FURAZOLIDONE ET AL. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted.

No. 71–709. SUMIDA ET AL. *v.* YUMEN ET AL. C. A. 9th Cir. Motions to dispense with printing petition and brief in opposition granted. Certiorari denied. Reported below: 444 F. 2d 1281.

No. 71–720. CERONE ET AL. *v.* UNITED STATES;
No. 71–759. ANGELINI *v.* UNITED STATES; and
No. 71–760. CORTINA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted for reasons stated in his dissent in *Addonizio* v. *United States, ante,* p. 936. Reported below: 452 F. 2d 274.

No. 71–884. CHANDLER, U. S. DISTRICT JUDGE *v.* O'BRYAN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 445 F. 2d 1045.

No. 71–737. MICHIGAN *v.* TRUDEAU. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 385 Mich. 276, 187 N. W. 2d 890.

No. 71–790. PERKINS *v.* LAIRD, SECRETARY OF DEFENSE. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted.

No. 71–792. GRUBBS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 451 F. 2d 275.

No. 71–799. UNIVERSITY HILL FOUNDATION *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 701.

No. 71–814. CORTRIGHT ET AL. *v.* FROEHLKE, SECRETARY OF THE ARMY, ET AL. C. A. 2d Cir. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 245.

No. 71–881. ILLINOIS *v.* HUDSON. Sup. Ct. Ill. Certiorari denied, it appearing that judgment of the Supreme Court of Illinois rests upon an adequate state ground. Reported below: 50 Ill. 2d 1, 276 N. E. 2d 345.

No. 71–5686. LAUCHLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner brought this civil rights lawsuit pursuant to 42 U. S. C. § 1985 to recover damages from agents of the Alcohol, Tobacco, and Firearms Division of the Treasury Department. He alleged that they had conducted un-

lawful searches of his property beyond the scope of their warrants. Both lower courts denied the petitioner, a pauper, permission to proceed *in forma pauperis*. The terse orders simply stated that the unlawful search issue was frivolous.[1] Yet there is no doubt that a civil rights damages action is appropriate where federal agents ransack one's premises without authority. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971). The Solicitor General, however, contends that the order of the Court of Appeals was nonetheless correct because the agents' searches had already been validated in the previous and finalized criminal proceeding.[2]

This action, brought to vindicate deprivations of Fourth Amendment privileges, is akin to that of the remedy of federal habeas corpus. The latter relief is not barred merely because the grounds relied on have been rejected on direct review of the conviction.[3] Inasmuch as both 42

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[1] With respect to the frivolity standard under 28 U. S. C. § 1915, I have previously stated my view that the principle of equal protection of the laws prohibits a court from denying a pauper access to judicial machinery where a similarly situated but wealthier litigant could have obtained a ruling on the merits of his claim simply by paying docketing fees. Here the petitioner was unable to pay the docketing fee required by the Court of Appeals and was unable to pay the service fee (but was able to pay the $15 docketing fee) required by the District Court. *Cruz* v. *Hauck*, 404 U. S. 59 (1971).

[2] The Solicitor General may not be entirely correct in his implied assertion that all of the issues tendered in the instant complaint had been litigated in the criminal proceeding. Only searches conducted on April 17, 1969, were before the Court of Appeals. 444 F. 2d 1037, 1041 (CA7 1971). In addition to those seizures, petitioner's civil rights complaint attacked searches conducted on other dates which were not litigated in the previous prosecution inasmuch as the seized items were not sought to be introduced.

[3] Even where a federal prisoner continues to raise the same issue by filing repetitive petitions pursuant to 28 U. S. C. § 2255, the reviewing judge may not perfunctorily deny the later ones solely on the doctrine of *res judicata*. "[I]t is open to the applicant to show

U. S. C. § 1985 and federal habeas corpus are designed to make whole those who have been injured, either through loss of liberty or property, by unconstitutional conduct, it is unclear why collateral estoppel should apply against a prisoner in a civil rights action but not in his habeas action on the same issue. If Lauchli is subsequently freed on habeas on the very claim tendered here, will his civil rights action still be barred?

The Solicitor General says that the validity of petitioner's arrest and the searches of his premises, now challenged in this civil action, was "fully litigated and upheld in the criminal proceedings." That is partially true but not completely so. In the criminal case the motion to suppress the evidence was heard only by the court and it ruled on the question whether there was "probable cause" for the searches. But the issues tendered in this civil rights case will be for a jury to resolve. Is Lauchli barred from a jury trial on his civil rights suit merely because in the prior criminal case a judge ruled there was "probable cause" for the search?

These are important questions upon which we should have briefs and arguments.

The issue assumes added importance in light of the Government's current position that collateral estoppel does not bar it from re-prosecuting a defendant in a forfeiture lawsuit for the same alleged course of conduct for which he had previously been acquitted. In No. 71–672, *United States* v. *Two Hundred and One 50-pound Bags of Furazolidone,* the Solicitor General has petitioned this Court to reverse a Court of Appeals' determination that a prior acquittal of a defendant charged with smuggling animal feed in violation of 18 U. S. C. § 545 is a bar to a subsequent *in rem* forfeiture action

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that the ends of justice would be served by permitting the redetermination of the ground." *Sanders* v. *United States,* 373 U. S. 1, 16 (1963).

brought by the Government against the feed on grounds that it was imported in violation of the same section.

The forfeiture case is not distinguishable from this case on the theory that the forfeiture action is "civil" and requires a lesser standard of proof. We have long held that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal." *Boyd* v. *United States*, 116 U. S. 616, 634 (1886). In *United States* v. *U. S. Coin & Currency*, 401 U. S. 715, 718 (1971), we found "no difference between a man who 'forfeits' $8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct."

May the Government have its cake and eat it too? May it (a) maintain that *res judicata* does not defeat forfeiture actions which are brought subsequent to acquittals and which are based on the same course of conduct, yet (b) plead collateral estoppel to a prisoner's attempts to recover damages for allegedly unconstitutional searches previously sustained on direct review of his conviction? [4]

I would grant the petition for certiorari or at the very least hold it for our disposition of No. 71–672.

No. 71–5762. SHARROW *v.* BROWN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 447 F. 2d 94.

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[4] This proposition, of course, does not foreclose the possibility that the Court could hold against the Government in both situations. By analogizing the subsequent civil rights lawsuit to the habeas action, collateral estoppel might be found inapplicable. By requiring that the Government join all "criminal" charges flowing from a single course of conduct in a single proceeding the Government's subsequent forfeiture action could be barred. *Green* v. *United States*, 355 U. S. 184 (1957); see my dissenting opinion in *Hoag* v. *New Jersey*, 356 U. S. 464, 477 (1958).

No. 71–5761. JOYCE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. Reported below: 147 U. S. App. D. C. 128, 454 F. 2d 971.

Rehearing Denied

No. 71–499. MASCIA *v.* UNITED STATES, 404 U. S. 1025;

No. 71–527. UNITED STATES *v.* STANDARD OIL CO. OF CALIFORNIA, 404 U. S. 558;

No. 71–536. WILKINS, ADMINISTRATRIX *v.* AMERICAN EXPORT ISBRANDTSEN LINES, INC., 404 U. S. 1018;

No. 71–591. RAWLS *v.* CONDÉ NAST PUBLICATIONS, INC., 404 U. S. 1038; and

No. 71–5546. DUNLEAVAY *v.* ROCKEFELLER CENTER, INC., ET AL., 404 U. S. 1062. Petitions for rehearing denied.

No. 70–79. RELIANCE ELECTRIC CO. *v.* EMERSON ELECTRIC CO., 404 U. S. 418. Petition for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 70–290. GAS LIGHT CO. OF COLUMBUS *v.* GEORGIA POWER CO. ET AL., 404 U. S. 1062; and

No. 70–5049. BURNS *v.* SWENSON, WARDEN, ET AL., 404 U. S. 1062. Petitions for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions.

No. 71–5444. CARLOUGH *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, 404 U. S. 1026. Petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 71–5277. CARTER *v.* COURT OF CRIMINAL APPEALS OF TEXAS, 404 U. S. 1012. Motion for leave to file petition for rehearing denied.

MARCH 3, 1972

Miscellaneous Order

No. 71–1080. UNITED MINE WORKERS OF AMERICA *v.* BRYANT, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

MARCH 6, 1972

Order Appointing Clerk

It is ordered that Michael Rodak, Jr., be appointed Clerk of this Court to succeed E. Robert Seaver effective at the commencement of business March 4, 1972, and that he take the oath of office and give bond as required by statute and the order of this Court entered November 22, 1948.

Affirmed on Appeal

No. 71–929. FORBUSH ET AL. *v.* WALLACE, GOVERNOR OF ALABAMA, ET AL. Affirmed on appeal from D. C. M. D. Ala. Reported below: 341 F. Supp. 217.

No. 71–5806. CHARLESTON ET AL. *v.* WOHLGEMUTH ET AL. Affirmed on appeal from D. C. E. D. Pa. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and case set for oral argument. Reported below: 332 F. Supp. 1175.

Appeals Dismissed

No. 71–805. PHILADA HOME FUND, INC. *v.* BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71–624. THOMPSON *v.* THOMPSON. Appeal from Super. Ct. Pa. Motion of appellee for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 217 Pa. Super. 874, 272 A. 2d 189.

No. 71–5773. FAIR *v.* WIGGINS. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71–932. WOODS ET AL. *v.* SOCIETY FOR THE PROPAGATION OF THE FAITH OF THE ARCHDIOCESE OF NEW ORLEANS, INC., ET AL. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 259 La. 897, 253 So. 2d 221.

Vacated and Remanded on Appeal

No. 70–291. OSMOND ET AL. *v.* SPENCE ET AL. Appeal from D. C. Del. Motion to dispense with printing jurisdictional statement granted. Judgment vacated and case remanded for further consideration in light of *Swarb* v. *Lennox, ante,* p. 191, and *D. H. Overmyer Co., Inc., of Ohio* v. *Frick Co., ante,* p. 174. Order of June 21, 1971, entered by MR. JUSTICE BRENNAN, as modified by his order of August 20, 1971, shall continue in effect unless and until superseded by order of District Court. Reported below: 327 F. Supp. 1349.

No. 71–5262. CARPENTER ET AL. *v.* STERRETT, ADMINISTRATOR, DEPARTMENT OF PUBLIC WELFARE OF INDIANA, ET AL. Appeal from D. C. N. D. Ind. Motion for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Townsend* v. *Swank* and *Alexander* v. *Swank,* 404 U. S. 282.

Other Summary Disposition

No. 71–5421. MIDGETT *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. Order of this Court heretofore entered on February 22, 1972 [certiorari granted, *ante,* p. 916], in this case is hereby revoked. Certiorari dismissed. Reported below: 443 F. 2d 1090.

Miscellaneous Orders

No. 71–41. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL–CIO *v.* FLAIR BUILDERS, INC. [Certiorari granted, 404 U. S. 982.] Request for additional time for filing brief for respondent granted and 30 additional days allotted for that purpose. Typewritten briefs may be filed in lieu of printed briefs. J. Robert Murphy, Esquire, of Aurora, Illinois, invited to file a brief and argue in this case as *amicus curiae* in support of judgment below.

No. 71–709. SUMIDA ET AL. *v.* YUMEN ET AL., *ante,* p. 964. Motion to disbar denied.

No. 71–1017. GRAVEL *v.* UNITED STATES; and

No. 71–1026. UNITED STATES *v.* GRAVEL. [Certiorari granted, *ante,* p. 916.] Motion to expedite granted so that the consolidated cases may be briefed and argued during the present Term of Court. Motion of Unitarian Universalist Assn. for leave to participate in oral argument as *amicus curiae* in No. 71–1017 denied.

No. 71–665. VASQUEZ ET AL. *v.* WALSH, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 71–812. LEMELSON *v.* PETTINE, CHIEF JUDGE, U. S. DISTRICT COURT. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 71–5812. MAGEE *v.* NELSON, WARDEN, ET AL. Motion for leave to file petition for writ of prohibition denied.

No. 71-5791. CLEAVES *v.* PENNSYLVANIA ET AL.; and

No. 71-5792. KNIGHT *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Granted

No. 71-1016. FEDERAL POWER COMMISSION *v.* LOUISIANA POWER & LIGHT CO. ET AL.; and

No. 71-1040. UNITED GAS PIPE LINE CO. ET AL. *v.* LOUISIANA POWER & LIGHT CO. ET AL. C. A. 5th Cir. Petitions for certiorari to review judgment of United States Court of Appeals for the Fifth Circuit in *Federal Power Commission* v. *Louisiana Power & Light Co.* (CA No. 71-2550) granted and cases consolidated. Petitions for certiorari before judgment to review opinion and order of Federal Power Commission (FPC Opinion No. 606, *United Gas Pipe Line Co.*) denied. Motion to expedite granted so that the consolidated cases may be briefed and argued during present Term of Court. Motions of Humble Oil & Refining Co. and State of Louisiana et al. for leave to file briefs as *amici curiae* granted. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions and motions. Reported below: 456 F. 2d 326.

No. 71-839. ERLENBAUGH ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted limited to Question 1, presented by the petition, which reads as follows:

"1. Whether the Court of Appeals erred in not following the opinion of the Court of Appeals for the Fourth Circuit in a 1967 case entitled U. S. vs Arnold, 380 Federal 2nd, 366, thus creating a conflict between the circuits."

MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 452 F. 2d 967.

No. 71–909. ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* MINK ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: —— U. S. App. D. C. ——, 464 F. 2d 742.

Certiorari Denied. (See also Nos. 71–624, 71–805, 71–5773, 71–1016, and 71–1040, *supra.*)

No. 71–702. TOCCO *v.* UNITED STATES;

No. 71–5916. RICHMOND *v.* UNITED STATES;

No. 71–5924. SMITH *v.* UNITED STATES; and

No. 71–5925. LONG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 288.

No. 71–783. MARTELLA *v.* MARINE COOKS & STEWARDS UNION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 729.

No. 71–787. MONSANTO CO. *v.* DAWSON CHEMICAL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 1035.

No. 71–818. PACE CO., DIVISION OF AMBAC INDUSTRIES, INC. *v.* FROEHLKE, SECRETARY OF THE ARMY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 2d 890.

No. 71–821. DELTA DEVELOPMENT CO., INC., ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 989.

No. 71–826. 967.905 ACRES OF LAND IN COOK COUNTY ET AL., MINNESOTA, ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 447 F. 2d 764.

No. 71–842. BAKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 21.

No. 71–846. SIRAGUSA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 592.

No. 71–860. TROPIANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–875. IVIMEY *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th & 10th Jud. Dists. Certiorari denied.

No. 71–878. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–882. HUNTER *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 279 N. C. 498, 183 S. E. 2d 665.

No. 71–903. JONES *v.* BOARD OF EDUCATION OF DAVIESS COUNTY. Ct. App. Ky. Certiorari denied. Reported below: 470 S. W. 2d 829.

No. 71–911. PRESSMAN *v.* NELLIS. Ct. App. D. C. Certiorari denied. Reported below: 282 A. 2d 539.

No. 71–917. BARBIZON ELECTRIC CO., INC. *v.* CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 36 App. Div. 2d 923, 321 N. Y. S. 2d 322.

No. 71–922. COHN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 452 F. 2d 881.

No. 71–927. TROPIANO *v.* MOSELEY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 71–5753. ALTIMUS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 736.

No. 71–5766. BETTKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 506.

No. 71–5767. MCHENRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 194.

No. 71–5768. CLAYTON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 450 F. 2d 16.

No. 71–5770. MASELLI *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5772. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 781.

No. 71–5775. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 493.

No. 71–5776. HOLMES *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 71–5777. GREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 447 F. 2d 987.

No. 71–5778. LAWS *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied. Reported below: 448 F. 2d 74.

No. 71–5779. EISEN *v.* SILVER. C. A. 2d Cir. Certiorari denied.

No. 71–5781. JACKSON *v.* PICARD, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 1st Cir. Certiorari denied.

No. 71–5782. YOUNG *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 443 F. 2d 854.

No. 71–5783. PATTERSON *v.* TULSA LOCAL No. 513, MOTION PICTURE OPERATORS OF THE UNITED STATES & CANADA. C. A. 10th Cir. Certiorari denied. Reported below: 446 F. 2d 205.

No. 71–5784. ROY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 18 Cal. App. 3d 537, 95 Cal. Rptr. 884.

No. 71–5785. GREEN *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 71–5786. CAGLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 644.

No. 71–5793. MAGEE *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied.

No. 71–5796. MILLER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–5797. MCBRIDE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 446 F. 2d 229.

No. 71–5798. MCLEAN, AKA MCCLEAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 448 F. 2d 1399.

No. 71–5800. CREASMAN *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF HENDERSONVILLE ET AL. Sup. Ct. N. C. Certiorari denied. Reported below: 279 N. C. 361, 183 S. E. 2d 115.

No. 71–5802. MCGAHEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 2d 738.

No. 71–5804. LOGAN *v.* LYON ET AL. C. A. 2d Cir. Certiorari denied.

No. 71–5805. KLABIN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71–5807. JOHNSON *v.* BRIERLEY, PENITENTIARY SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 444 F. 2d 1177.

No. 71–5808. HALEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 444 F. 2d 61.

No. 71–5810. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5811. COOKE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5809. HALEY *v.* UNITED STATES; and

No. 71–5851. LILEY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 452 F. 2d 391.

No. 71–5813. SULLIVAN *v.* BUCHKOE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–5814. SEEWALD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 1159.

No. 71–5939. BROWN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 2d 101.

No. 71–246. OSWALD, CORRECTION COMMISSIONER, ET AL. *v.* SOSTRE. C. A. 2d Cir. Motion to dispense with printing *amicus curiae* brief of National Law Office of National Legal Aid & Defender Assn. and motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 442 F. 2d 178.

No. 71–548. HAMILTON *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Alameda. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–593. BERG *v.* SCHMIDT, JUDGE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–910. SIMS ET AL. *v.* PARKE DAVIS & CO. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 453 F. 2d 1259.

No. 71–930. BENSON ET AL. *v.* RICH ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 1371.

No. 71–5771. MUNCASTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 1367.

No. 71–5799. ROBINSON *v.* DAVIS ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 753.

No. 71–809. SOBEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted. Reported below: 443 F. 2d 1370.

No. 71–833. DACOSTA *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 1368.

MR. JUSTICE DOUGLAS, dissenting.

Once again, this Court is confronted with a challenge to the constitutionality of the presidential war which has raged in Southeast Asia for nearly a decade.[1] Once again, it denies certiorari. Once again, I dissent.

I have expressed at length my view that the constitutional questions raised by conscription for a presidential war are both substantial and justiciable. See, *e. g.*, *Massachusetts* v. *Laird*, 400 U. S. 886 (DOUGLAS, J., dis-

[1] Petitioner DaCosta is a Portuguese citizen permanently resident in the United States. He was conscripted into the United States Army in December 1970, and commenced this action in July 1971, to enjoin enforcement of military orders deploying him to Vietnam. He alleges that participation by the United States in the Vietnamese conflict has not been authorized by Congress conformably with the Constitution, and that absent such authorization, Congress has no power to conscript for military service in armed conflict overseas.

senting) (*Mass. I*); *Hart* v. *United States*, 391 U. S. 956 (DOUGLAS, J., dissenting); *Holmes* v. *United States*, 391 U. S. 936 (DOUGLAS, J., dissenting); *Mora* v. *McNamara*, 389 U. S. 934, 935 (DOUGLAS, J., dissenting); *Mitchell* v. *United States*, 386 U. S. 972 (DOUGLAS, J., dissenting).

The circuits are in conflict as to the justiciability of these questions. Compare *Massachusetts* v. *Laird*, 451 F. 2d 26 (CA1 1971) (*Mass. II*), and *Orlando* v. *Laird*, 443 F. 2d 1039 (CA2 1971), with *Velvel* v. *Nixon*, 415 F. 2d 236 (CA10 1969), and *Luftig* v. *McNamara*, 126 U. S. App. D. C. 4, 373 F. 2d 664 (1967).

This Court, of course, should give deference to the coordinate branches of the Government. But we did not defer in the *Prize Cases*, 2 Black 635, when the issue was presidential power as Commander in Chief to order a blockade. We did not defer in the *Steel Seizure Case*,[2] when the issue was presidential power, in time of armed international conflict, to order the seizure of domestic steel mills. Nor should we defer here, when the issue is presidential power to seize, not steel, but people. See *Mass. I*, *supra*, at 891–900.

The Constitution gives Congress the power "To declare War," Art. I, § 8; and it is argued that the Constitution gives to Congress the *exclusive* power to determine when it has declared war. But if there is such a "textually demonstrable constitutional commitment," *Baker* v. *Carr*, 369 U. S. 186, 217, it is for this Court to determine its scope. *Powell* v. *McCormack*, 395 U. S. 486, 521. See *Mass. I*, *supra*, at 892.

While we debate whether to decide the constitutionality of this war, our countrymen are daily compelled to undergo the physical and psychological tortures of armed

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[2] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

combat on foreign soil. Families and careers are disrupted; young men maimed and disfigured; lives lost. The issues are large; they are precisely framed; we should decide them.

No. 71–883. PEARL *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted.

No. 71–920. IN RE O'CONNOR. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 71–953. JOHNSON *v.* REED ET VIR. Sup. Ct. Tex. Motion to dispense with printing petition granted. Certiorari denied. Reported below: See 464 S. W. 2d 689.

Rehearing Denied

No. 1469, October Term, 1970. HOMART DEVELOPMENT CO. *v.* DIAMOND ET AL., 402 U. S. 988. Joint motion for leave to file petition for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN are of the opinion that the motion should be granted.

No. 71–437. AMATO ET AL. *v.* WISCONSIN, 404 U. S. 1063;

No. 71–5504. FEURTADO *v.* FLORIDA, 404 U. S. 1047; and

No. 71–5536. WICKLINE *v.* BROOKS ET AL., 404 U. S. 1061. Petitions for rehearing denied.

MARCH 8, 1972

Dismissal Under Rule 60

No. 71–747. GRAUSAM *v.* MURPHEY, STATE HOSPITAL DIRECTOR, ET AL. C. A. 3d Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 448 F. 2d 197.

MARCH 17, 1972

Miscellaneous Order

No. A–937 (71–1170). WHDH, INC. *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT; and

No. A–937 (71–1171). WHDH, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Application for stay pending action on petition for writ of certiorari [No. 71–1171] and motion for leave to file petition for writ of mandamus [No. 71–1170] presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

MARCH 20, 1972

Affirmed on Appeal

No. 71–936. MANARD ET AL. *v.* MILLER, ATTORNEY GENERAL OF VIRGINIA, ET AL. Affirmed on appeal from D. C. E. D. Va. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

Appeals Dismissed

No. 71–675. KAPPOS *v.* IOWA. Appeal from Sup. Ct. Iowa dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 189 N. W. 2d 563.

No. 71–5399. PERRYMAN *v.* WASHINGTON. Appeal from Sup. Ct. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: See 4 Wash. App. 356, 481 P. 2d 462.

No. 71–5590. SALISBURY *v.* OREGON. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 5 Ore. App. 463, 484 P. 2d 1129.

Certiorari Granted—Vacated and Remanded. (See No. 71–5552, *ante*, p. 319.)

Other Summary Disposition

No. 71–431. IMMIGRATION AND NATURALIZATION SERVICE *v.* VITALES. C. A. 9th Cir. [Certiorari granted, 404 U. S. 983.] Judgment vacated and case remanded with directions to dismiss petition to review order of deportation. Reported below: 443 F. 2d 343.

Miscellaneous Orders

No. A–880. SHELTON *v.* BRUNSON ET AL. D. C. N. D. Tex. Application for stay of deployment presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would continue stay pending timely filing and disposition of a petition for writ of certiorari in this Court.

No. A–905. DAVIS ET AL. *v.* CINEMA CLASSICS, LTD., INC., ET AL.; and

No. A–913. BUSCH ET AL. *v.* CINEMA CLASSICS, LTD., INC., ET AL. D. C. C. D. Cal. Applications for stay of preliminary injunction presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. A–962. CALIFORNIA *v.* ANDERSON. Sup. Ct. Cal. Application of State of California for stay of judgment of Supreme Court of California (Crim. 13617) denied. Reported below: 6 Cal. 3d 628, 493 P. 2d 880.

No. 50, Orig. VERMONT *v.* NEW YORK ET AL. Motion of Monroe County Conservation Council for leave to intervene as a party plaintiff denied.

No. A–926. DOE (SCHWARTZ, REAL PARTY IN INTEREST) *v.* UNITED STATES. C. A. 2d Cir. Application for stay of execution of sentence for civil contempt presented to MR. JUSTICE MARSHALL, and by him referred to the Court, granted pending further order of this Court.

No. 54, Orig. UNITED STATES *v.* FLORIDA ET AL. Motion for leave to file bill of complaint granted and defendants allotted 60 days to answer.

No. 70–283. ADAMS, WARDEN *v.* WILLIAMS. C. A. 2d Cir. [Certiorari granted, 404 U. S. 1014.] Motion of District Attorney of New York County for leave to participate in oral argument as *amicus curiae* denied.

No. 71–110. GELBARD ET AL. *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 404 U. S. 990.] Motion of petitioner Gelbard for assignment of a separate docket number and/or additional time for oral argument denied.

No. 71–263. UNITED STATES *v.* EGAN ET AL. C. A. 3d Cir. [Certiorari granted, 404 U. S. 990.] Motion of Ramsey Clark and Leonard B. Boudin to permit Jack J. Levine to argue orally *pro hac vice* on behalf of respondent Egan granted.

No. 71–315. DEEPSOUTH PACKING CO., INC. *v.* LAITRAM CORP. C. A. 5th Cir. [Certiorari granted, 404 U. S. 1037.] Motion of Edward S. Irons et al., for leave to file a brief as *amici curiae* granted.

No. 71–708. TRAFFICANTE ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 915.] Motion of petitioners to dispense with printing briefs and appendix granted.

No. 71–858. RICCI *v.* CHICAGO MERCANTILE EXCHANGE ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 953.] Motion for reconsideration of petition for certiorari denied.

No. 71–288. LAIRD, SECRETARY OF DEFENSE, ET AL. *v.* TATUM ET AL. C. A. D. C. Cir. [Certiorari granted, 404 U. S. 955.] Motion of Sam J. Ervin, Jr., for additional time to participate in oral argument as *amicus curiae* denied. Permission for two counsel to argue on behalf of respondents granted.

No. 71–1024. SIXTY-SEVENTH MINNESOTA STATE SENATE *v.* BEENS ET AL.; and

No. 71–1145. SIXTY-SEVENTH MINNESOTA STATE SENATE *v.* BEENS ET AL. Appeals from D. C. Minn. Motion to expedite denied. Cases consolidated. Reported below: 336 F. Supp. 715.

No. 71–1128. KELEMEN ET AL. *v.* SERBIAN ORTHODOX CHURCH CONGREGATION OF ST. DEMETRIUS OF AKRON. Sup. Ct. Ohio. Motion for consolidation with Nos. 71–563 [*Rohrbaugh* v. *Presbytery of Seattle, Inc.*] and 71–867 [*Simich* v. *Milisavljevic*] denied.

No. 71–5255. BARKER *v.* WINGO, WARDEN. C. A. 6th Cir. [Certiorari granted, 404 U. S. 1037.] Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted. Motion of M. Curran Clem to permit Robert W. Willmott, Jr., for leave to argue orally *pro hac vice* on behalf of respondent granted.

No. 71–5833. ALEXANDER *v.* MINNESOTA. Motion for leave to file petition for writ of certiorari denied.

No. 71–5819. BOYD *v.* GAFFNEY, WARDEN; and

No. 71–5847. HITCHCOCK *v.* EYMAN, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71–949. GARRISON ET AL. *v.* BROWN, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL. Motion for leave to file petition for writ of mandamus and/or other relief denied.

No. 71–1013. TEITELBAUM *v.* STONE, SECRETARY OF STATE OF FLORIDA;

No. 71–5816. PAIGE *v.* CHAMBERS, CHIEF JUDGE, U. S. COURT OF APPEALS;

No. 71–5893. DEBORDE *v.* HAMILTON, CHIEF JUSTICE, SUPREME COURT OF WASHINGTON, ET AL.; and

No. 71–5897. PUTNAM *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. Motions for leave to file petitions for writs of mandamus denied.

No. 71–968. MEDANSKY *v.* WILL, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE DOUGLAS is of the opinion that the motion should be granted.

No. 71–5837. FEATHERINGHAM *v.* ASHLAND COUNTY COURT OF COMMON PLEAS ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 71–718. MCGINNIS, COMMISSIONER OF CORRECTION ET AL. *v.* ROYSTER ET AL. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. Reported below: 332 F. Supp. 973.

No. 71–862. UNITED AIR LINES, INC. *v.* MAHIN, DIRECTOR OF DEPARTMENT OF REVENUE, ET AL. Appeal from Sup. Ct. Ill. Probable jurisdiction noted. Reported below: 49 Ill. 2d 45, 273 N. E. 2d 585.

Certiorari Granted

No. 71–366. TIDEWATER OIL CO. *v.* UNITED STATES ET AL. C. A. 9th Cir. Motion for leave to file petition for rehearing granted. Order of this Court denying petition for writ of certiorari on November 9, 1971 [404 U. S. 941], vacated. Certiorari granted.

No. 71–692. Illinois *v.* Somerville. C. A. 7th Cir. Certiorari granted. Reported below: 447 F. 2d 733.

No. 71–711. National Labor Relations Board *v.* Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL–CIO. C. A. 1st Cir. Certiorari granted. Reported below: 446 F. 2d 369.

No. 71–829. Mourning *v.* Family Publications Service, Inc. C. A. 5th Cir. Motion of National Conference of Commissioners on Uniform State Laws for leave to file a brief as *amicus curiae* and certiorari granted. Reported below: 449 F. 2d 235.

No. 71–964. Pennsylvania *v.* Ware. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 446 Pa. 52, 284 A. 2d 700.

No. 71–5908. Chambers *v.* Mississippi. Sup. Ct. Miss. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 252 So. 2d 217.

Certiorari Denied. (See also Nos. 71–675, 71–5399, and 71–5590, *supra.*)

No. 71–641. Escobar *v.* California. Super. Ct. Cal., County of Orange. Certiorari denied.

No. 71–662. Rohm et al. *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 71–734. Rivera *v.* United States; and
No. 71–5946. Caraballo *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 71–776. Harville Rose Service *v.* Kellogg Co. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 1346.

No. 71–852. C. D. CONSTRUCTION CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 451 F. 2d 470.

No. 71–853. GREENBERG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 449 F. 2d 1223.

No. 71–854. DEUTSCH Co., METAL COMPONENTS DIVISION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 902.

No. 71–867. SIMICH ET AL. *v.* MILISAVLJEVIC ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 71–869. DEUTSCH Co., ELECTRONIC COMPONENTS DIVISION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 901.

No. 71–876. NEMETZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 924.

No. 71–886. STRACHAN SHIPPING Co. ET AL. *v.* CITY OF GALVESTON; and

No. 71–890. RORIE *v.* CITY OF GALVESTON. Sup. Ct. Tex. Certiorari denied.

No. 71–892. ZAMBRANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 452 F. 2d 416.

No. 71–893. LANE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 71–896. LOZOFF *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 71–897. NEW YORK DISTRICT COUNCIL No. 9, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied.

No. 71–899. GARCIA-GUILLERN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 1189.

No. 71–902. MUNICIPAL LIGHT BOARD OF READING, MASSACHUSETTS, ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 146 U. S. App. D. C. 294, 450 F. 2d 1341.

No. 71–905. MORSE ET UX. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 195 Ct. Cl. 1, 443 F. 2d 1185.

No. 71–906. MOUNTAIN FUEL SUPPLY CO. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 449 F. 2d 816.

No. 71–908. STRAUSS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 375.

No. 71–915. UNITED STATES ET AL. *v.* PARKER ET AL.; and

No. 71–973. KAIBAB INDUSTRIES ET AL. *v.* PARKER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 448 F. 2d 793.

No. 71–916. KAUFMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 452 F. 2d 1202.

No. 71–926. STUHL *v.* 527 MADISON AVENUE CO. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 36 App. Div. 2d 502, 321 N. Y. S. 2d 811.

No. 71–933. OHRYNOWICZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 71–945. LEMELSON *v.* TOPPER CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 845.

No. 71–934. DUBELKO *v.* DUBELKO. Sup. Ct. Ohio. Certiorari denied.

No. 71–948. GIPE, GUARDIAN *v.* DEMPSEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 451 F. 2d 1309.

No. 71–955. CRIM, AKA MILLER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 272 N. E. 2d 85.

No. 71–958. AKTIEBOLAGET FLYMO ET AL. *v.* CODY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 146 U. S. App. D. C. 345, 452 F. 2d 1274.

No. 71–961. ROBERTS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied.

No. 71–967. WAHL ET AL. *v.* CARRIER MANUFACTURING CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 96.

No. 71–985. MAURICE A. GARBELL, INC., ET AL. *v.* HAUK, U. S. DISTRICT JUDGE (BOEING CO. ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 71–987. MOODY *v.* MOODY. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 465 S. W. 2d 836.

No. 71–989. BROWN *v.* MICHIGAN DEPARTMENT OF MILITARY AFFAIRS. Sup. Ct. Mich. Certiorari denied. Reported below: 386 Mich. 194, 191 N. W. 2d 347.

No. 71–1053. JAMIESON *v.* AMERICAN NATIONAL SAFE DEPOSIT CO. ET AL. App. Ct. Ill., 1st Jud. Dist. Certiorari denied. Reported below: 133 Ill. App. 2d 647, 273 N. E. 2d 741.

No. 71–5442. HAYS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 467 S. W. 2d 354.

No. 71–5535. MITCHELL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 275 Cal. App. 2d 351, 79 Cal. Rptr. 764.

No. 71–5540. REED *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 71–5544. ALLEN *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–5545. COLLINS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 71–5570. DIMAGGIO *v.* PRUDENTIAL SAVINGS & LOAN ASSN. Sup. Ct. Wis. Certiorari denied.

No. 71–5583. SMITH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 71–5605. COSCO *v.* MEACHAM, WARDEN. Sup. Ct. Wyo. Certiorari denied.

No. 71–5815. DUNNINGS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–5817. BURNS *v.* COLUMBIA PICTURES INTERNATIONAL CORP. ET AL. C. A. 9th Cir. Certiorari denied.

No. 71–5822. BASKIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 449 F. 2d 729.

No. 71–5823. GREEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–5824. BURTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 438 F. 2d 1089.

No. 71–5825. JOYNER *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 71–5826. JOHNSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 252 So. 2d 221.

No. 71–5827. BRYANT *v.* UNITED STATES;
No. 71–5996. FEGGETT *v.* UNITED STATES; and
No. 71–6050. BURKHALTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 451 F. 2d 394.

No. 71–5831. LEMON *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 71–5832. WOODFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5834. FACKELMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5835. FREEMAN *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 71–5836. CASTALDI *v.* UNITED STATES; and
No. 71–5988. MCBRIDE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 453 F. 2d 506.

No. 71–5838. HINTON *v.* RODRIGUEZ, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 71–5839. FREEDMAN *v.* AMERICAN EXPORT ISBRANDTSEN LINES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 157.

No. 71–5841. MCDANIEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 832.

No. 71–5842. BOYD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 477.

No. 71–5843. LOCKETT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–5844. GREEN *v.* LAIRD, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 71–5846. BRUNGES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 947.

No. 71–5848. LOTT *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 71–5849. GIBBS *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied.

No. 71–5850. GRAHAM *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL. (AEROJET-GENERAL CORP. ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–5853. TIMMONS *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 71–5856. CACAVAS *v.* GENERAL MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 444 F. 2d 506.

No. 71–5857. CHRISTIAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 37 App. Div. 2d 765, 324 N. Y. S. 2d 753.

No. 71–5859. WYATT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–5862. HUBER ET AL. *v.* STATE BOARD OF BAR EXAMINERS OF GEORGIA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 886.

No. 71–5863. GOODMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 944.

No. 71–5864. WATSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 450 F. 2d 290.

No. 71–5865. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 71–5867. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 788.

No. 71–5868. HALPRIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 322.

No. 71–5869. DANIEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 298.

No. 71–5870. MACCOLLOM *v.* ROLLINS ET AL. C. A. 10th Cir. Certiorari denied.

No. 71–5871. WING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 806.

No. 71–5873. LOVE ET AL. *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 447 F. 2d 50.

No. 71–5878. KENT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 751.

No. 71–5879. LUCKETT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–5880. FERENC *v.* JOHNSON, PENITENTIARY SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 71–5882. BRONSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 449 F. 2d 302.

No. 71–5883. BIBLE *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 2d 111.

No. 71–5885. IANNARELLI *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 3d Cir. Certiorari denied.

No. 71–5889. DENMAN ET AL. *v.* SCANNELL ET AL. C. A. 1st Cir. Certiorari denied.

No. 71–5884. BOULWARE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 2d 135, 272 N. E. 2d 538.

No. 71–5891. LINDSEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 701.

No. 71–5892. LEDERMAN *v.* NEW YORK CITY TRANSIT AUTHORITY ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71–5894. BARTLETT, GUARDIAN *v.* HOLLOPETER. Sup. Ct. Ohio. Certiorari denied.

No. 71–5895. KELLEY *v.* SPRINKLE. C. A. 8th Cir. Certiorari denied.

No. 71–5898. OAKS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 445 F. 2d 1062.

No. 71–5900. NOVICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 1111.

No. 71–5901. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 343.

No. 71–5902. OLIVER *v.* DUGGAN, DISTRICT ATTORNEY OF ALLEGHENY COUNTY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 71–5903. FOREMAN *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 71–5904. WELLS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 281 A. 2d 226.

No. 71–5907. HOYT *v.* UNITED STATES; and
No. 71–5952. BOWMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 570.

No. 71–5909. SWANSON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 251 Ark. 147, 471 S. W. 2d 351.

No. 71–415. COLORADO RIVER WATER CONSERVATION DISTRICT *v.* ROCKY MOUNTAIN POWER CO. ET AL. Sup. Ct. Colo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 174 Colo. 309, 486 P. 2d 438.

No. 71–563. ROHRBAUGH ET AL. *v.* PRESBYTERY OF SEATTLE, INC., ET AL. Sup. Ct. Wash. Motion of Mary Elizabeth Blue Hull Memorial Presbyterian Church, a Georgia Nonprofit Corp., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 79 Wash. 2d 367, 485 P. 2d 615.

No. 71–609. TERMINAL FREIGHT HANDLING CO. ET AL. *v.* SOLIEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD;

No. 71–924. SEARS, ROEBUCK & CO. ET AL. *v.* SOLIEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD; and

No. 71–925. TERMINAL FREIGHT COOPERATIVE ASSN. ET AL. *v.* SOLIEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. 8th Cir. Motions of Sears, Roebuck & Co. for leave to intervene in Nos. 71–609 and 71–925 denied. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these motions and petitions. Reported below: No. 71–609, 444 F. 2d 699; No. 71–924, 450 F. 2d 353.

No. 71–874. FELTMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 153.

No. 71–868. CARTRADE, INC. *v.* FORD DEALERS ADVERTISING ASSOCIATION OF SOUTHERN CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 289.

No. 71–5519. HINNINGTON *v.* DEPARTMENT OF CORRECTIONS OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 445 F. 2d 856.

No. 71–5528. BROWN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: —— Tenn. App. ——, 470 S. W. 2d 39.

No. 71–5609. GOODART *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5624. ALCALA *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 487 P. 2d 448.

No. 71–5818. MARCIANO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 450 F. 2d 1022.

No. 71–5820. DAUGHDRILL, ADMINISTRATRIX *v.* DIAMOND M. DRILLING CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 781.

No. 71–5829. HOWARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5821. MALATESTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 447 F. 2d 1365.

No. 71–5877. SMART *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 931.

No. 71–5905. CRUZ *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–871. PORDUM *v.* UNITED STATES; and
No. 71–5890. LUDERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of these petitions. Reported below: 451 F. 2d 1015.

No. 71–907. UNITED STATES *v.* THOMPSON. C. A. D. C. Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 147 U. S. App. D. C. 1, 452 F. 2d 1333.

No. 71–960. MULLINS *v.* OHIO. Sup. Ct. Ohio. Motion to dispense with printing petition granted. Certiorari denied.

No. 71–965. LOVISI ET VIR *v.* VIRGINIA. Sup. Ct. Va. Motion of respondent for leave to dispense with printing brief granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5874. WHITE *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to file supplemental petition granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 696.

No. 71–5828. CROW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 451 F. 2d 323.

No. 71–5888. BAXTER *v.* DAVIS ET AL. C. A. 1st Cir. Motion for leave to amend petition granted. Certiorari denied. Reported below: 450 F. 2d 459.

Rehearing Granted. (See No. 71–366, *supra.*)

Rehearing Denied

No. 1588, October Term, 1970. SEARS, ROEBUCK & CO. ET AL. *v.* SOLIEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL., 403 U. S. 905, 404 U. S. 960. Motion for leave to file second petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 71–612. VON POPPENHEIM *v.* PORTLAND BOXING & WRESTLING COMM'N ET AL., 404 U. S. 1039. Petition for rehearing denied.

No. 71–5171. CUNNINGHAM *v.* WINGO, WARDEN, 404 U. S. 1064, and *ante,* p. 948. Motion for leave to file second petition for rehearing denied.

No. 71–5534. OLIVER *v.* HARRISON COUNTY CLERK ET AL., 404 U. S. 1061. Motion for leave to file petition for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Customs and Patent Appeals during the period beginning May 1, 1972, and ending May 5, 1972, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

MARCH 24, 1972

Miscellaneous Order

No. A–980. OPATZ *v.* CITY OF ST. CLOUD ET AL. Sup. Ct. Minn. Application for temporary injunction pending appeal, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. Reported below: 293 Minn. 379, 196 N. W. 2d 298.

MARCH 27, 1972

Affirmed on Appeal

No. 71–891. CAPITAL BROADCASTING CO. ET AL. *v.* ACTING ATTORNEY GENERAL ET AL. Appeal from D. C. D. C. Motion of John F. Banzhaf III et al. for leave to file a brief as *amici curiae* and to dispense with printing granted. Judgment affirmed. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that probable jurisdiction should be noted. MR. JUSTICE POWELL took no part in the consideration or decision of this motion or appeal. Reported below: 333 F. Supp. 582.

No. 71–919. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* ACTING ATTORNEY GENERAL ET AL. Affirmed on appeal from D. C. D. C. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that probable jurisdiction should be noted. Reported below: 333 F. Supp. 582.

No. 71–1030. KIERNAN ET AL. *v.* LINDSAY, MAYOR OF NEW YORK, ET AL. Affirmed on appeal from D. C. S. D. N. Y. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 334 F. Supp. 588.

Appeals Dismissed

No. 71–600. STATE BOARD OF ELECTION COMMISSIONERS ET AL. *v.* EVERS ET AL. Appeal from D. C. S. D. Miss. dismissed for failure to docket case within time prescribed by Rule 13 (1). Reported below: 327 F. Supp. 640.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring.

I join the Court's dismissal of this appeal for failure to docket within the prescribed time. I do so despite the fact that the Court apparently has not consistently enforced the provisions of its Rule 13 (1) and, on occasion, has permitted appeals despite untimely docketing. See, for example, another Mississippi voting rights case, *Whitley* v. *Williams*, one of the cases decided with *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969). Compare *Johnson* v. *Florida*, 391 U. S. 596, 598n (1968), and *United Public Workers* v. *Mitchell*, 330 U. S. 75, 84–86 (1947), with *Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co.*, 385 U. S. 32 (1966); *Landry* v. *Boyle*, 393 U. S. 220 (1968); *Shapiro* v. *Doe*, 396 U. S. 488 (1970); *Stein* v. *Luken*, 396 U. S. 555 (1970); and *United States* v. *Cotton*, 397 U. S. 45 (1970).

Because I do not wish this disposition of the case to provide a basis for any inference that I, as one member of this Court, am in agreement with the reasoning set forth in the *per curiam* opinion of the three-judge District Court, 327 F. Supp. 640 (SD Miss. 1971), I append this comment.

Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 84 Stat. 315, 42 U. S. C. § 1973c, first provides that a State, upon proposing an alteration of voting qualifications and procedures of the kind specified, may institute an action for an approving declaratory

judgment in the United States District Court for the District of Columbia. It then goes on as follows:

> "*Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsesequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. . . ."

In the present case, the changes in Mississippi's election laws effected by the legislature in 1970 were submitted to the Attorney General of the United States on July 23, 1970. In September the Mississippi Attorney General received a letter from the Assistant Attorney General of the Civil Rights Division of the Department of Justice reading in part as follows:

> "The problem posed by these enactments is extremely complex. . . .
>
> ". . . [W]e have been unable to reach the conclusion that the projected effect would be to deprive Negro voters of rights under the Voting Rights Act.
>
> . . . . .
>
> "Under these circumstances, the Attorney General is not prepared at this time—60 days after receipt of these statutes—to make any determination of the validity or invalidity of Acts 362 and 363 under the Voting Rights Act. . . . Should our subsequent investigation persuade us that the acts in fact vio-

late the 15th Amendment, the Voting Rights Act or other applicable federal legislation, we will take appropriate legal steps to raise the issues in court, or, if litigation is initiated by others to participate therein in an appropriate manner.

"I want to make clear that no inference of approval or disapproval is to be drawn from the failure of the Attorney General to object within the statutory period. The fact is that we have been unable to reach a decision within the alloted time on the basis of available evidence. . . ."

The three-judge District Court granted its injunctive relief on the ground that the pre-clearance requirements of § 5 had not been satisfied. It did not reach the substantive allegations of racial discrimination set forth in the appellees' complaint. Specifically, the District Court said, "Since Mississippi's new laws have not been subjected to the required federal scrutiny, they are still in a state of suspended animation." The court held that until the statutorily suggested favorable declaratory judgment was obtained in the District of Columbia, or the Mississippi laws were *resubmitted* to the Attorney General and he had specifically approved, "the acts involved in this case may not be given any effect." 327 F. Supp., at 644.

I am unable so to read § 5 of the Voting Rights Act of 1965, and I cannot subscribe to the District Court's reasoning. Section 5, it seems to me, plainly and clearly provides that if the proposal has been properly submitted to the Attorney General, as it was, "and the Attorney General has not interposed an objection within sixty days after such submission," as he did not, the proposed statutory changes "may be enforced" without the court's proceeding in the District of Columbia and without resubmission to the Attorney General. Here the proposal was properly submitted to the Attorney

General and he took no action by way of interposing an objection within the allowed 60 days. I do not see how the statute can be read or construed in any way other than to the effect that the conditions of its proviso were fulfilled and that the proposed new legislation was therefore enforceable, subject, of course, to the statute's recognized exception as to any contest on the merits. I see nothing in *Perkins* v. *Matthews*, 400 U. S. 379, 385 (1971), that supports a contrary conclusion. In my view the District Court's holding, when it equated nonaction by the Attorney General with the interposition by him of an objection, is without foundation in the statute.

With the promulgation on September 10, 1971, of "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965," 36 Fed. Reg. 18186–18190, 28 CFR §§ 51.1–51.29, and the specific procedure authorized for the Attorney General by § 51.19, the problem should not arise in the future.

MR. JUSTICE DOUGLAS, dissenting.

I would not dismiss this appeal for nonjurisdictional tardiness in docketing. There is no doubt that we have statutory jurisdiction to hear this case under 42 U. S. C. § 1973c. And, no doubt we may waive our self-imposed Rule 13 (1) inasmuch as "the requirement of docketing within sixty days [is not a] limitation on our power to hear [an] appeal." *United Public Workers* v. *Mitchell*, 330 U. S. 75, 86. But, as MR. JUSTICE BLACKMUN observes, *ante*, at 1001, this Court has failed to develop even the shadow of a consistent practice concerning the effect to be given an appellant's failure to docket within the prescribed time. In some cases the defect has been fatal [1]

[1] *Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co.*, 385 U. S. 32; *Landry* v. *Boyle*, 393 U. S. 220; *Shapiro* v. *Doe*, 396 U. S. 488; *Stein* v. *Luken*, 396 U. S. 555; *United States* v. *Cotton*, 397 U. S. 45; *Cheley* v. *Parham*, 404 U. S. 878.

while in others it has been forgiven.[2] This appeal was docketed 66 days late. Yet in *Johnson* v. *Florida*, 391 U. S. 596, 598, we entertained without explanation an appeal which was 56 days tardy. And, Mississippi's own experience with the vagaries of our dispensation of waivers has not been an illuminating one. In *Whitley* v. *Williams*, decided with *Allen* v. *State Board of Elections*, 393 U. S. 544, another challenge to that State's voting laws, the State was the appellee and the challenger's appeal was docketed 60 days out of time. Nonetheless, the infraction was passed over, the case was heard, and the District Court was reversed.

I cannot acquiesce in an arbitrary practice which permits the Court to sweep unpleasant cases under the rug.[3] Unless we are willing to prescribe criteria for guiding our granting of waivers of the docketing requirement, such as we have done in Rule 19 for exercising our certiorari discretion, then we should either enforce Rule 13 (1) for all or for none.

No. 71–1003. HORSE CREEK ROYALTY CORP. ET AL. *v.* SOUTHLAND ROYALTY CO. ET AL. Appeal from Sup. Ct. Wyo. dismissed for want of properly presented federal question. Reported below: 489 P. 2d 214.

No. 71–5915. STRICKLAND ET AL. *v.* BOARD OF EDUCATION, SAN FRANCISCO UNIFIED SCHOOL DISTRICT, ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Reported below: 20 Cal. App. 3d 83, 97 Cal. Rptr. 422.

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[2] *United Public Workers* v. *Mitchell*, 330 U. S. 75, 86; *Johnson* v. *Florida*, 391 U. S. 596, 598; *Whitley* v. *Williams*, decided with *Allen* v. *State Board of Elections*, 393 U. S. 544; see also *Durham* v. *United States*, 401 U. S. 481 (Rule 22 (2) waiver).

[3] This is not a frivolous appeal. Whatever the infirmities of the Mississippi voting statute, there is a strong argument, as MR. JUSTICE BLACKMUN indicates, that the District Court may have erred in using § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c, to enjoin its effectiveness.

No. 71–5948. PRESLER *v.* STATE DIVISION OF HUMAN RIGHTS ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Other Summary Disposition

No. 70–251. JOSEPH *v.* UNITED STATES. C. A. 3d Cir. [Certiorari granted, 404 U. S. 820.] After this Court granted the writ of certiorari in this case, the Solicitor General, in his Memorandum for the United States on the merits, took a position different from that previously asserted by the United States in the United States Court of Appeals for the Third Circuit and in his opposition to the petition for writ of certiorari. We therefore vacate the judgment and remand the case for consideration in light of the position now asserted by the Solicitor General. Reported below: 438 F. 2d 1233.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

While I think the judgment should be vacated and the case remanded, I would not do so on the Solicitor General's confession of error, but rather for the reason that meaningful administrative and judicial review of Selective Service classification decisions is impossible where the Service does not state reasons for its actions.

Joseph, then classified I–A, applied for a conscientious objector exemption in April 1967. He stated in his conscientious objector form (SSS Form 150) that he believed in a Supreme Being, that he was a member of the Nation of Islam (Black Muslims), and that he had joined Muhammed's Mosque No. 12, in Philadelphia, in April 1965, at the age of 17. He represented the views of the Black Muslims regarding participation in war as follows:

> "We believe that we who declared ourselves to be Rightous [*sic*] Muslims Should not Participate in

> wars which take the lives of humans. We do not believe this nation should force us to take part in such wars, for we have nothing to gain from it unless America agrees to give us the necessary territory wherein we may have something to fight for."

Joseph's board met on June 8, 1967. Based on the information in the SSS Form 150 and in the rest of Joseph's file, but without the benefit of a meeting with Joseph, the board voted unanimously to retain him in Class I–A, and sent him a notice of classification (SSS Form 110) to this effect. No reasons were given for the classification decision.

The Solicitor General argues from the premise that when the board acted, it effectively "reopened" Joseph's classification. According to the Solicitor General, the applicable regulations then in force prohibited a board from reopening a classification without first determining that a prima facie case had been made out. See 32 CFR §§ 1625.2, 1625.4. "[N]ot prepared to assume" that the board violated the reopening regulations, the Solicitor General reasons that the fact of reopening must therefore mean that the board had concluded (albeit erroneously) that Joseph had made out a prima facie case, and denied the claim because it questioned his sincerity.

The first difficulty with this argument is that a local board may well have the power to reopen a classification on a lesser showing than a prima facie case. See, *e. g.*, *United States* v. *Stephens*, 445 F. 2d 192, 196 (CA3 1971). Second, the Solicitor General's argument rests on the intent of the board. If the board did not think that it was reopening, there would have been no reason for it to worry about the prima facie case requirements allegedly contained in the reopening regulations. And the Solicitor General concedes that "some confusion" as to whether the June 8 action was a "reopening" developed at trial. Memorandum for the United States 18–19.

Assuming, however, that there was a reopening, the Solicitor General's argument still fails, for the board's subsequent handling of Joseph's claim rebuts any "presumption of regularity" that might otherwise be appropriate. Joseph's letter requesting an appeal from the June 8, 1967, decision was received by the board July 6, 1967. The request was thus timely under 32 CFR § 1626.2 (c)(1). No action was taken, however, until August 1, 1967, when Joseph was notified that his "statutory rights have expired," but that he was requested to appear August 10, 1967, for an interview. Joseph appeared as requested, and on August 14, 1967, the board forwarded his file to the appeal board. There is no indication in Joseph's file that the board took any action as a result of the August 10 "interview."

The above course of action embodied several violations of the Selective Service regulations. First, Joseph's statutory rights had not expired on August 1, 1967. His appeal was timely, and was required to be processed in accordance with 32 CFR § 1626.14, which stipulates that "in no event shall [a registrant's] file be forwarded [to the appeal board] later than five days after the period for taking an appeal has elapsed." The board violated this regulation by keeping Joseph's file past July 13, 1967.

Had Joseph requested a personal appearance in the letter written by him and received by the board on July 6, 1967, the board would have been authorized to retain his file. But he did not. The interview which the board granted him was a mere courtesy. As such, it was unauthorized by statute, *United States* v. *Hayden*, 445 F. 2d 1365, 1374 (CA9 1971), and could not operate to relieve the board of its statutory obligation to forward Joseph's file pursuant to the mandate of 32 CFR § 1626.14.

It can also be argued, from the fact that Joseph was

given an interview after the board received his letter on July 6, 1967, that the letter was deemed a request to reopen, as well as an appeal. There was testimony at Joseph's trial that the board's failure to indicate any action following the interview meant that it had refused to reopen Joseph's classification. (Testimony of Mr. Plaskow, App. 14.) But where a board refuses a registrant's written request to reopen his classification, it must so advise him, by letter, and it must place a copy of the letter in his file. 32 CFR § 1625.4. Joseph's board did not do so.

Whatever force the "presumption of regularity" might have in the ordinary case, it is a weak reed on which to rest under these circumstances. But the "presumption" is the linchpin of the Solicitor General's analysis; without it, a number of alternate hypotheses become as plausible as if not more plausible than that offered by the Solicitor General.

For example, it was the Government's consistent position, until the Solicitor General's confession in *Clay* v. *United States*, 403 U. S. 698, that conscientious objector claims based on Black Muslim teachings did not satisfy the statutory requirement that they be based on "religious training and belief." The Justice Department letter quoted in *Clay, supra*, is representative of the Government's views at the time that Joseph's claim was under consideration:

> "It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad. . . . It is therefore our conclusion that registrant's claimed objections to participation in war insofar as they are based upon the teachings of the Nation of Islam, rest on

grounds which primarily are political and racial." 403 U. S., at 702.

If one is to decide this case by speculation and assumption, a likely analysis is that Joseph's local board knew of, and followed, the Justice Department's articulated policy with respect to Black Muslim conscientious objector claims. Joseph stated in his SSS Form 150, "I receive my training from the honorable Elijah Muhammad Last Messenger of Allah Leader and Teacher of the Nation of Islam here in The Wilderous [*sic*] of North America." Given the Government's oft-articulated views as to the insufficiency of such teachings to support a conscientious objector claim, Joseph's local board may well have denied his exemption for failure to demonstrate it was based on "religious training and belief." The Solicitor General concedes that such a ground would have been clear error. Memorandum for the United States 14 n. 13. See *Clay, supra,* at 703.

There is also the possibility that Joseph's board thought him to be a selective objector, because his statement of belief left open the possibility that he might fight if "America agrees to give us the necessary territory wherein we may have something to fight for." The Solicitor General strenuously insists that this is indeed the correct analysis of Joseph's claim.[1]

Finally, there is the difficulty inherent in accepting the Solicitor General's assumption that Joseph's claim was not denied for failure to meet any of the statutory criteria, but for insincerity. It is well settled that mere disbelief in the sincerity of a registrant, based on no objective evidence of insincerity, will not suffice to deny a con-

[1] Joseph argues persuasively, however, that this statement is nothing more than the Muslim equivalent of a Jehovah's Witness' declaration that he will fight in defense of "Kingdom Interests." *Sicurella* v. *United States,* 348 U. S. 385. See Brief for Petitioner 23–25.

scientious objector claim once a prima facie case is made out. *Dickinson* v. *United States*, 346 U. S. 389; *United States* v. *Hayden, supra*, at 1373. The "evidence of insincerity" pointed to by the Solicitor General is ambiguous at best. He notes that Joseph joined the Muslims a year before he first registered for the draft, and two years before filing for his conscientious objector exemption, but that he made no claim to conscientious objector status in his Classification Questionnaire, and no subsequent claim of late crystallization. By themselves, these facts seem insufficient. Joseph was a 17-year-old high school dropout when he became a Muslim. His lack of sophistication and minimal writing skills are apparent from his communications with the board. If we are to assume with the Solicitor General that Joseph's board found he made out a prima facie case, I should think it also follows that the board, having gone thus far, would make further inquiries into Joseph's sincerity rather than rely on such an ambiguous and inartful record.[2]

These speculations should not be taken to mean that I think the Solicitor General's analysis should be rejected. It is perhaps no less probable than the alternatives that I have suggested. The point is that it is no *more* probable.

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[2] Other alleged indicia of insincerity need little comment. Many smokers would take issue with the Solicitor General's attempt to demean Joseph's statement that his ability to give up smoking was a demonstration of his faith. And, the statement by an unknown Army official that a psychological interview of petitioner revealed him to have "a mature attitude and interest in the Armed Forces" is simply meaningless without more information as to the nature of the interview in question and the particular responses on which the Army's conclusory remark was based. Moreover, the interview took place over five months before petitioner first filed his conscientious objector claim, and thus certainly cannot be taken as representing his views at the time his conscientious objector claim was denied.

Joseph's local and appeal boards might have denied his claim because he was thought to be insincere, because his Black Muslim beliefs were not thought to be religious, because he was thought to be a selective objector, or perhaps for some other reason not apparent from the record. Viewing this bare record from our perspective, there is simply no way to decide why it was that Joseph's claim was denied.[3]

The conviction must be reversed, therefore, not because Joseph made out a prima facie case and is thereby entitled to reasons, but because without a statement of reasons, it is impossible even to tell if Joseph's prima facie showing was a relevant factor in the administrative process.[4] I would require the Selective Service to pro-

[3] The *"de novo"* review undertaken by the appeal board suffers from this same deficiency. We do not know why the appeal board affirmed the lower board's action, for it, too, gave no reasons. And, the appeal board is just as much in the dark as we are with respect to the basis for the lower board's action. "The Appeal Boards are no more entitled to speculate as to the basis for Local Board action than are reviewing courts." *United States* v. *Speicher*, 439 F. 2d 104, 108 (CA3 1971). The appeal board, of course, should also be required to give reasons, for the proposition "[t]hat judicial review of two administrative agency actions unsupported by reasons is somehow less futile than judicial review of one such action," *id.*, at 107, is clearly untenable.

[4] This analysis is unchanged by the fact that the Administrative Procedure Act is not directly applicable to agency action under the Military Selective Service Act of 1967. See 50 U. S. C. App. § 463 (b). It remains a "simple but fundamental rule of administrative law . . . [that if] the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action." *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196–197.

Thus, in analyzing an NLRB decision dealing with the process of certifying labor representatives, a process expressly exempt from the formal procedural requirements of the Administrative Procedure Act, see 5 U. S. C. § 554 (a)(6), the Court squarely held that

vide a concise statement of reasons whenever a requested classification is denied, and whatever the administrative level at which the denial takes place.

Certiorari Granted—Vacated and Remanded

No. 71–5840. LENHARD *v.* UNITED STATES. C. A. 2d Cir. In his memorandum for the United States in response to petition for writ of certiorari in this case, filed February 1, 1972, the Solicitor General asserted a position different from that previously asserted by the United States in the United States Court of Appeals for the Second Circuit. We therefore grant the petition, vacate the judgment, and remand case to that court for consideration in light of the position now asserted by the Solicitor General.

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the Board's determination could not stand unless supported by a statement of reasons:

"When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197. See *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 167–169; *Interstate Commerce Comm'n* v. *J-T Transport Co.*, 368 U. S. 81, 93. Although Board counsel in his brief and argument before this Court has rationalized the different unit determinations in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administrative process requires that 'courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . .' *Burlington Truck Lines* v. *United States*, *supra*, at 168; see *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194, 196. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' *Securities & Exchange Comm'n* v. *Chenery Corp.*, *supra*, at 196." *NLRB* v. *Metropolitan Ins. Co.*, 380 U. S. 438, 443–444 (footnote omitted).

No. 70–5056. ST. CLAIR *v.* SELECTIVE SERVICE LOCAL BOARD NO. 35, BROOKLYN, NEW YORK, ET AL. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Fein* v. *Selective Service System, ante,* p. 365. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

No. 71–316. BLATT *v.* LOCAL BOARD NO. 116, FREDERICKSBURG CITY SELECTIVE SERVICE SYSTEM, ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Fein* v. *Selective Service System, ante,* p. 365. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case. Reported below: 443 F. 2d 304.

No. 71–448. MORGAN *v.* MELCHAR ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Fein* v. *Selective Service System, ante,* p. 365. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case. Reported below: 442 F. 2d 1082.

Miscellaneous Orders

No. A–986. WASHINGTON STATE LABOR COUNCIL, AFL–CIO *v.* JERTBERG ET AL. D. C. W. D. Wash. Application for temporary stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 40, Orig. PENNSYLVANIA *v.* NEW YORK ET AL. Motion of State of Pennsylvania for additional time for oral argument granted and a total of 45 minutes allotted to each side for oral argument, the time to be allocated by the parties. [For earlier orders herein, see, *e. g.,* 404 U. S. 988.]

No. 45, Orig. WASHINGTON ET AL. *v.* GENERAL MOTORS CORP. ET AL. Motion of plaintiffs for leave to file supplemental brief after argument granted. [For earlier orders herein, see, *e. g.*, 402 U. S. 940.]

No. 71–492. LLOYD CORP., LTD. *v.* TANNER ET AL. C. A. 9th Cir. [Certiorari granted, 404 U. S. 1037.] Motions of Homart Development Co. and American Retail Federation for leave to file briefs as *amici curiae* granted. Motion of Homart Development Co. for leave to participate in oral argument as *amicus curiae* denied.

No. 71–506. UNITED STATES ET AL. *v.* MIDWEST VIDEO CORP. C. A. 8th Cir. [Certiorari granted, 404 U. S. 1014.] Motion of State of Illinois for leave to participate in oral argument as *amicus curiae* denied.

No. 71–1016. FEDERAL POWER COMMISSION *v.* LOUISIANA POWER & LIGHT CO. ET AL.; and
No. 71–1040. UNITED GAS PIPE LINE CO. ET AL. *v.* LOUISIANA POWER & LIGHT CO. ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 973.] Motions of Brooklyn Union Gas Co., Public Service Commission of State of New York, Columbia Gas Transmission Corp., and Pipeline Intervenors for leave to file briefs as *amici curiae* granted.

No. 71–5933. TANNER *v.* TWOMEY, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 71–5571. RODRIQUEZ *v.* CADY, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 71–5936. GAGLIE *v.* UNITED STATES DISTRICT COURT FOR CENTRAL DISTRICT OF CALIFORNIA. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 71–1021. EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF MISSOURI ET AL. *v.* DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF MISSOURI ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 452 F. 2d 820.

Certiorari Denied. (See also No. 71–5948, *supra.*)

No. 71–640. SAN DIEGO UNIFIED SCHOOL DISTRICT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 19 Cal. App. 3d 252, 96 Cal. Rptr. 658.

No. 71–803. MASON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 3d 759, 488 P. 2d 630.

No. 71–901. GROOB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 451 F. 2d 1210.

No. 71–912. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 440 F. 2d 1103 and 450 F. 2d 795.

No. 71–921. FISCHETTI ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 34.

No. 71–935. CHASON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 451 F. 2d 301.

No. 71–937. HOLMES *v.* UNITED STATES; and

No. 71–5961. MATTHEWS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 249.

No. 71–952. KOVTUN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 448 F. 2d 1268.

No. 71–990. SPERRY RAND CORP. *v.* A-T-O, INC., FORMERLY AUTOMATIC SPRINKLER CORP. OF AMERICA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 447 F. 2d 1387.

No. 71–1009. LINDAUER *v.* OKLAHOMA CITY URBAN RENEWAL AUTHORITY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 452 F. 2d 117.

No. 71–1015. SCHROEDER ET UX. *v.* BUSENHART ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 133 Ill. App. 2d 180, 272 N. E. 2d 750.

No. 71–1020. PHILADELPHIA CHEWING GUM CORP. *v.* SOMPORTEX LTD. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 453 F. 2d 435.

No. 71–1061. ARNESON PRODUCTS, INC., ET AL. *v.* BLUMENFELD. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71–5906. ANSTEAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 451 F. 2d 314.

No. 71–5911. OVERTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71–5913. ROBINSON, AKA BEASLEY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 279 N. C. 495, 183 S. E. 2d 650.

No. 71–5917. CRONAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 1303.

No. 71–5919. MENDOZA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 132 Ill. App. 2d 571, 270 N. E. 2d 540.

No. 71–5922. JOHNSON *v.* TURNER, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 71–5921. MAHAFFEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 471 S. W. 2d 801.

No. 71–5926. JONES *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 447 F. 2d 1395.

No. 71–5927. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 451 F. 2d 1321.

No. 71–5928. DRAKEFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–5929. WATTS *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 71–5931. SCHOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 2d 348.

No. 71–5935. LEWIS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 472 S. W. 2d 65.

No. 71–5940. SCHROEDER *v.* BUCHKOE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–5942. ARRIAGADA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 451 F. 2d 487.

No. 71–5943. BRAYTON ET AL. *v.* HOLLOPETER ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 71–5944. KYLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 446 F. 2d 1195.

No. 71–5945. DOWELL *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–5950. DOLLAR *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 71–5951. TATRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 452 F. 2d 1207.

No. 71–5953. KENNEDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–5954. CASTRO *v.* YEAGER, PRINCIPAL KEEPER. C. A. 3d Cir. Certiorari denied.

No. 71–5955. GAFFORD *v.* WARDEN, LEAVENWORTH PENITENTIARY, ET AL. C. A. 10th Cir. Certiorari denied.

No. 71–5958. HOLMES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5959. CALHOUN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 454 F. 2d 702.

No. 71–5963. TYLER *v.* PARKS ET AL. C. A. 8th Cir. Certiorari denied.

No. 71–6252. RAY *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 71–558. HEYD, SHERIFF *v.* BASTIDA. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 444 F. 2d 396.

No. 71–605. HENRY ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 444 F. 2d 1300.

No. 71–806. WEHINGER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–615. CHAPMAN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. It appearing the state court decision is not final, certiorari denied. Reported below: 17 Cal. App. 3d 865, 95 Cal. Rptr. 242.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner operates a bookstore in Fremont, California. On two occasions, a police officer visited the store and purchased four magazines and one paperback novel. While in the store the second time, the officer also "looked at parts" of 12 additional magazines and 14 other paperback books which were on petitioner's shelves. Based upon a reading of the four magazines, portions of the book, and the officer's conclusory affidavit, a magistrate issued an *ex parte* search warrant authorizing the seizure of the publications the officer had earlier purchased or perused. The warrant was executed and 78 copies of 35 different titles were seized. Among the items seized were 19 copies of nine magazines not specified in the warrant and apparently not previously evaluated by a magistrate.

Petitioner was charged with the sale or distribution of obscene matter in violation of Cal. Penal Code § 311.2. Petitioner made a motion under §§ 1538.5, 1539, and 1540 of the Cal. Penal Code to suppress the evidence and to return the property seized. The municipal court ordered the return of the books which had not been specified in the warrant and of one book which it found not to be obscene.[1] It denied petitioner's motion in all other re-

[1] It does not appear that the respondent appealed from that portion of the municipal court's order suppressing the books which had not been specified in the warrant or which had been found not to be obscene. The Court of Appeal nonetheless upheld the admissibility of those books which had not been specified in the warrant and vacated the municipal court's order to the contrary.

spects. On appeal, the Appellate Department of the Superior Court ordered the suppression of those items which had been seized without a prior adversary hearing on their obscenity *vel non* but affirmed the municipal court with regard to the materials which had been purchased. The State then appealed and the Court of Appeal reversed in part the judgment of the Appellate Department and vacated in part the judgment of the municipal court, thereby allowing the admission into evidence of all the items except the one which had been determined not to be obscene. 17 Cal. App. 3d 865, 95 Cal. Rptr. 242. The Supreme Court of California denied a hearing and petitioner now seeks a writ of certiorari.

Our jurisdiction to review decisions of state courts is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." 28 U. S. C. § 1257. The finality requirement, which has been with us since the Judiciary Act of 1789, § 25, 1 Stat. 85, is "[d]esigned to avoid the evils of piecemeal review," *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62, 67, and is founded upon "considerations generally applicable to good judicial administration." *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 124. Our decisions make clear, however, that "this provision of the statute [has long been given a] practical rather than a technical construction." *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 546. Thus, where denial of review would effectively foreclose our later consideration of a federal claim, *California* v. *Stewart,* 383 U. S. 903, 384 U. S. 436, 498 n. 71; *Hill* v. *Chicago & Evanston R. Co.,* 140 U. S. 52, 54; where postponement of review would seriously erode a federal policy, *Construction Laborers* v. *Curry,* 371 U. S. 542, 550; *Rosenblatt* v. *American Cyanamid Co.,* 86 S. Ct. 1, 3; or where determination of preliminary questions might

avoid subsequent litigation, *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555, 558, we have determined that the requirement of finality had been satisfied. Similarly, where the subsequent proceedings in state court would deny the federal right for the vindication of which review was sought, we have concluded that the case was final. See, *e. g.*, *Klopfer* v. *North Carolina*, 386 U. S. 213 (speedy trial); *Harris* v. *Washington*, 404 U. S. 55 (double jeopardy); *Colombo* v. *New York*, *ante*, p. 9 (double jeopardy). And, as MR. JUSTICE WHITE indicated for the Court in *Mercantile National Bank* v. *Langdeau*, *supra*, at 558, we have found the policies underlying § 1257 satisfied where the matter to be reviewed was entirely "separate and independent" from those to be raised in the subsequent state proceedings.[2]

In *Mills* v. *Alabama*, 384 U. S. 214, a case strikingly similar to the present one, we determined that the finality requirement had been met. There, the trial court had sustained a demurrer to the complaint, but the Supreme Court of Alabama reversed and remanded for trial. Mr. Justice Black, speaking for eight members of the Court, concluded that we had jurisdiction under § 1257:

> "The State has moved to dismiss this appeal on the ground that the Alabama Supreme Court's judgment is not a 'final judgment' and therefore not appealable under § 1257. The State argues that

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[2] "This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U. S. C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." 371 U. S., at 558.

since the Alabama Supreme Court remanded the case to the trial court for further proceedings not inconsistent with its opinion (which would include a trial), the Supreme Court's judgment cannot be considered 'final.' This argument has a surface plausibility, since it is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did, and he therefore has no defense in the Alabama trial court. Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets. The language of § 1257 as we construed it in *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 381–383, does not require a result leading to such consequences. See also *Construction Laborers* v. *Curry*, 371 U. S. 542, 548–551; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 72–74. Following those cases we hold that we have jurisdiction." 384 U. S., at 217–218. (Footnotes omitted.)

In a concurring opinion joined by MR. JUSTICE BRENNAN, I said:

> "We deal here with the rights of free speech and press in a basic form: the right to express views on matters before the electorate. In light of appellant's concession that he has no other defense to offer should the case go to trial, and considering the importance of the First Amendment rights at stake in this litigation, it would require regard for some remote, theoretical interests of federalism to conclude that this Court lacks jurisdiction because of the unlikely possibility that a jury *might* disregard a trial judge's instructions and acquit.
>
> "Indeed, even had appellant been unwilling to concede that he has no defense—apart from the constitutional question—to the charges against him, we would be warranted in reviewing this case. That result follows *a fortiori* from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution." 384 U. S., at 221. (Citations omitted.)

The issues petitioner tenders are important ones. They go to the constitutionality of mass seizures of materials presumptively protected by the First Amendment, *Quantity of Books* v. *Kansas*, 378 U. S. 205; *Marcus* v. *Search Warrant*, 367 U. S. 717; the need for a prior adversary hearing before protected materials are condemned as obscene, *Lee Art Theatre, Inc.* v. *Virginia*, 392 U. S. 636; *Quantity of Books* v. *Kansas, supra;* the procedural burdens which must be overcome to secure the return of protected materials, *United States* v. *Thirty-seven Photographs*, 402 U. S. 363; cf. *Freedman*

v. *Maryland*, 380 U. S. 51; the sufficiency of the officer's affidavit, the seizure of materials not specified in the warrant, *Stanley* v. *Georgia*, 394 U. S. 557, 569 (STEWART, J., concurring); *Marron* v. *United States*, 275 U. S. 192; and, of course, the obscenity *vel non* of the publications.

No significant question of fact or law remains for trial. It seems beyond argument that petitioner possessed the publications in question "for sale or distribution." Cal. Penal Code § 311.2. Petitioner's only viable defenses appear to be whether the publications were constitutionally protected and whether their seizure in some way was procedurally defective. These issues were passed upon by the courts below and are now before us for decision.

The purpose of furthering economy in judicial administration would plainly be served by deciding these questions now rather than by sending petitioner through the formalities of a trial and months—if not years—of repetitious appellate review before allowing him to present to this Court again the very issues that are here now.[3] California has sought to conserve its judicial resources by providing pretrial appellate review of suppression hearings. Where the admissibility of evidence is the only real issue, this policy generally results either in the prompt dismissal of the charges without trial or in a plea bargain and guilty plea. The interests in the smooth working of our federal system and our accommodation of California's interests in pretrial adjudication of dispositive questions of law dictate that we not postpone our consideration of the federal questions now presented.

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[3] Even if the California courts refuse to reconsider their earlier rulings, petitioner will be free to present the same claims now raised in the present petition for a writ of certiorari. R. Stern & E. Gressman, Supreme Court Practice 102 (4th ed. 1969).

This is not a case involving only a pretrial motion to suppress. Rather, the motion now before us embraces all of the evidence the prosecution will introduce at trial and common to all of these items is the issue of their obscenity *vel non*. *Mills* v. *Alabama*, *supra*, teaches that where First Amendment rights are involved, compliance with procedural formalities before allowing their vindication in this Court is not necessary unless those procedures are meaningful.

I would follow *Mills* and grant the petition for a writ of certiorari and put the case down for argument.

No. 71–816. DUN & BRADSTREET, INC. *v.* KANSAS ELECTRIC SUPPLY CO., INC. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 647.

No. 71–938. WINNEBAGO TRIBE OF NEBRASKA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 667.

No. 71–1008. HAWKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5912. WILLIAMSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.* MR. JUSTICE BRENNAN would grant the petition and set case for argument. Reported below: 450 F. 2d 585.

MR. JUSTICE DOUGLAS, dissenting.

Petitioners were suspected of maintaining an illicit whiskey still in violation of federal tax statutes. To secure evidence against them the Treasury Department

*[REPORTER'S NOTE: The following statement of MR. JUSTICE BRENNAN and dissenting opinion of MR. JUSTICE DOUGLAS were filed on April 3, 1972.]

planted in their midst an undercover agent who posed as a truck driver of their vendee. After gaining their confidence, this agent on 17 occasions in 1968, after our decision in *Katz* v. *United States*, 389 U. S. 347, telephoned either petitioner James Williamson or a coconspirator, one Hutcheson, for the ostensible purpose of finalizing arrangements for the delivery of their product. During their conversations, the agent was in a position to shape and guide the content and direction of their discussions and to elicit damaging admissions. All of these communications were intercepted and recorded by another federal officer who acted without a warrant and without the petitioner's knowledge but, of course, with the full cooperation of the Treasury plant. After the officers obtained satisfactory evidence against the pair, they were arrested, indicted, and convicted after a trial, at which all of the recordings were played, over objection, for the jury.

As I have discussed before, electronic eavesdropping early crept into our law as a means of combating "fifth column" activities during wartime.[1] Later, it was said that this weapon was essential in the battle against organized crime. Now we learn that the omnipresent electronic ear is stalking the hill country in search of moonshiners. Apparently, no suspect is too unimportant to escape its reach.

Nor is any person too important to be excluded from the Government's dossiers. Information recently presented to the Senate Subcommittee on Constitutional Rights discloses that subjects of Army intelligence oper-

[1] See Appendix I to my dissent in *United States* v. *White*, 401 U. S. 745, 766–767. I have expressed in more detail than here my opposition to various forms of electronic spying in *Katz* v. *United States*, 389 U. S. 347; *Berger* v. *New York*, 388 U. S. 41; *Osborn* v. *United States*, 385 U. S. 323; *Pugach* v. *Dollinger*, 365 U. S. 458; *Silverman* v. *United States*, 365 U. S. 505; *On Lee* v. *United States*, 343 U. S. 747.

ations have included Senators Fred Harris, Harold Hughes, Edward Kennedy, George McGovern, and Edmund Muskie.[2] The list also included five United States Representatives[3] and four Governors.[4] Indeed, the electronic ear was said to have turned on a Justice of this Court.[5] The Subcommittee found that the catalogue of organizations that had been subjected to surveillance embraced the NAACP, the ACLU, Operation Breadbasket, the Urban League, and the States' Rights Party.[6] Its hearings also revealed that Army spies had infiltrated Resurrection City,[7] the Poor People's Campaign,[8] both nominating conventions in 1968,[9] black studies programs,[10] and anti-war groups.[11]

Senator Ervin, who chaired these hearings, warns this Court in an *amicus* brief in another case, that "it is not an exaggeration to talk in terms of hundreds of thousands of individuals, organizations, events, and dossiers." [12]

After related hearings concerning federal wiretapping, Senator Edward Kennedy only months ago warned his

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[2] N. Y. Times, Feb. 29, 1972, p. 1, col. 3.

[3] *Id.*, at cols. 3–4. The list named Representatives Philip Crane, John Rarick, and Don Edwards, and former Representatives Adam Clayton Powell and Allard Lowenstein.

[4] *Id.*, at col. 4. The list named Governors Sargent of Massachusetts and Curtis of Maine; former Governors Hoff of Vermont and Kerner of Illinois; and Lieutenant Governor Hayes of Vermont.

[5] *Id.*, at col. 4.

[6] Amicus Curiae Brief submitted by Senator Sam Ervin, Jr., Chairman of the Subcommittee on Constitutional Rights, in *Laird* v. *Tatum*, No. 71–288, O. T. 1971, p. 10.

[7] Federal Data Banks, Computers and the Bill of Rights, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess., pt. 1, pp. 197–198 (1971).

[8] *Id.*, at 197.

[9] *Id.*, at 198–200.

[10] *Id.*, at 201, 296.

[11] *Ibid.*

[12] Amicus Brief, *supra*, n. 6, at 8.

colleagues of "the frightening possibility that the conversations of untold thousands of citizens of this country are being monitored on secret devices which no judge has authorized and which may remain in operation for months and perhaps years at a time." [13]

Although the problem is an enormous and recurring one, our decisions have not articulated a coherent response. Ironically, if petitioner James Williamson had confided in a genuine confederate rather than in a spy, there would be no doubt that the warrantless seizure of his telephonic communications would have offended *Katz* v. *United States, supra.* It was said, however, by a plurality in *United States* v. *White,* 401 U. S. 745, that speakers simply must assume the risk that their confidants may tattle, and, therefore, they should assume the further risk that every word they utter will be instantaneously fed into a recorder. Yet there is a significant "qualitative difference" between electronic surveillance and conventional police stratagems such as eavesdropping and disguise. *Lopez* v. *United States,* 373 U. S. 427, 465 (dissenting opinion). That chasm cannot be bridged simply by invoking the conclusory proposition that one must assume the risk of being subjected to electronic surveillance. Under that reasoning we might also have held that Katz should have assumed the risk that his telephone booth was bugged. Obviously, citizens must bear only those threats to privacy which we decide to impose.

The ruse employed by the Government in this case has still a further offensive characteristic. Here the agents had the opportunity not only to destroy a petitioner's privacy but to interrogate him in a clandestine fashion without the warnings required by *Miranda* v. *Arizona,* 384 U. S. 436, without the assistance of counsel, and

[13] Letter to members of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, from Senator Edward Kennedy, Dec. 17, 1971, pp. 2–3.

without knowledge that every word he spoke would be replayed to a court. Yet under the plurality reasoning in *White* such deception is permitted. Thus, both *Katz* and *Miranda* can be circumvented through the simple expedient of injecting a secret agent into a suspect situation.

I would grant this petition.

No. 71–5934. CARROLL *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 648.

No. 71–5956. BOGACKI *v.* BOARD OF SUPERVISORS OF RIVERSIDE COUNTY ET AL. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 5 Cal. 3d 771, 489 P. 2d 537.

No. 71–5957. CARRASCO-FAVELA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 445 F. 2d 865.

No. 71–931. VOLPE, SECRETARY OF TRANSPORTATION, ET AL. *v.* D. C. FEDERATION OF CIVIC ASSNS. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 148 U. S. App. D. C. 207, 459 F. 2d 1231.

MR. CHIEF JUSTICE BURGER, concurring.

I concur in the denial of certiorari in this case, but solely out of considerations of timing. Questions of great importance to the Washington, D. C., area are presented by the petition, not the least of which is whether the Court of Appeals has, for a second time, unjustifiably

frustrated the efforts of the Executive Branch to comply with the will of Congress as rather clearly expressed in § 23 of the Federal-Aid Highway Act of 1968, 82 Stat. 827.* If we were to grant the writ, however, it would be almost a year before we could render a decision in the case. It seems preferable, therefore, that we stay our hand. In these circumstances Congress may, of course, take any further legislative action it deems necessary to make unmistakably clear its intentions with respect to the project, even to the point of limiting or prohibiting judicial review of its directives in this respect.

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*Certain of the provisions of § 23 of the Federal-Aid Highway Act of 1968 were apparently enacted in response to the decision in *D. C. Federation of Civic Assns., Inc.* v. *Airis*, 129 U. S. App. D. C. 125, 391 F. 2d 478, in which it was held that the planning and construction of this project had to be carried out in strict compliance with the procedural requirements of Title 7 of the D. C. Code. Section 23 (a) of the Act provides that "[n]otwithstanding any other provision of law, or any court decision . . . to the contrary, the Secretary of Transportation and the government of the District of Columbia *shall . . . construct*" certain specified "routes on the Interstate System within the District of Columbia." (Emphasis added.) In § 23 (b), Congress singled out four particular projects, including this one, for special treatment by providing that work on those projects was to commence "[n]ot later than 30 days after the date of enactment of this section." In an earlier phase of the litigation involved in the instant petition, the Court of Appeals rejected the petitioners' contention that § 23 rendered inapplicable the pre-construction planning and public hearing requirements set out in various sections of Title 23 of the United States Code. *D. C. Federation of Civic Assns., Inc.* v. *Volpe*, 140 U. S. App. D. C. 162, 434 F. 2d 436. On remand following that decision, the District Court found that the petitioners had complied with all applicable provisions of Title 23 except those of § 128 relating to public hearings and those of § 109 relating to safety standards and other requirements. The Court of Appeals, in the decision that we are now being asked to review, reversed in part, holding that the petitioners had failed to comply with a number of additional pre-construction provisions of Title 23.

No. 71–941. FERRARA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motion to defer consideration and certiorari denied. Reported below: 451 F. 2d 91.

No. 71–956. FREEMAN, GUARDIAN, ET AL. *v.* FLAKE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 448 F. 2d 258.

MR. JUSTICE DOUGLAS, dissenting.

Today the Court declines to decide whether a public school may constitutionally refuse to permit a student to attend solely because his hair style meets with the disapproval of the school authorities. The Court also denied certiorari in *Olff* v. *East Side Union High School District*, 404 U. S. 1042, which presented the same issue. I dissented in *Olff*, and filed an opinion. For the same reasons expressed therein, I dissent today. I add only that now eight circuits have passed on the question. On widely disparate rationales, four have upheld school hair regulations (see *Freeman* v. *Flake*, 448 F. 2d 258 (CA10 1971); *King* v. *Saddleback Junior College District*, 445 F. 2d 932 (CA9 1971); *Jackson* v. *Dorrier*, 424 F. 2d 213 (CA6 1970); and *Ferrell* v. *Dallas Independent School District*, 392 F. 2d 697 (CA5 1968)), and four have struck them down (see *Massie* v. *Henry*, 455 F. 2d 779 (CA4 1972); *Bishop* v. *Colaw*, 450 F. 2d 1069 (CA8 1971); *Richards* v. *Thurston*, 424 F. 2d 1281 (CA1 1970); and *Breen* v. *Kahl*, 419 F. 2d 1034 (CA7 1969)).

I can conceive of no more compelling reason to exercise our discretionary jurisdiction than a conflict of such magnitude, on an issue of importance bearing on First Amendment and Ninth Amendment rights.

No. 71–5923. FAIRMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion for testing physical evidence and certiorari denied. Reported below: 451 F. 2d 209.

No. 71–999. DIXON, TREASURER OF ILLINOIS, ET AL. *v.* CASTLE, SENIOR JUDGE, U. S. COURT OF APPEALS, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 71–5567. MILLER *v.* SALISBURY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Motion to amend petition granted. Certiorari denied. Reported below: 448 F. 2d 186.

No. 71–5577. MCGREGOR *v.* SCHMIDT, SECRETARY, DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF WISCONSIN, ET AL. Sup. Ct. Wis. Certiorari and other relief denied.

Rehearing Denied

No. 70–161. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WRIGHT ET AL., *ante*, p. 208;

No. 70–5211. WRIGHT ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *ante*, p. 208;

No. 71–183. AGUA CALIENTE BAND OF MISSION INDIANS ET AL. *v.* COUNTY OF RIVERSIDE, CALIFORNIA, *ante*, p. 933; and

No. 71–659. DEVILLIERS *v.* ATLAS CORP., *ante*, p. 933. Petitions for rehearing denied.

No. 70–28. UNITED STATES *v.* GENERES ET VIR, *ante*, p. 93. Petition for rehearing denied. MR. JUSTICE POWELL AND MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 70–267. NATIONAL LABOR RELATIONS BOARD *v.* SCRIVENER, DBA AA ELECTRIC CO., *ante*, p. 117. Motions to dispense with printing and to dispense with taxation of costs granted. Petition for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States District Court for the Southern District of Texas during the period beginning November 1, 1972, and ending December 31, 1972, and for such additional time in advance thereof to prepare for the trial of cases, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

APRIL 3, 1972

Affirmed on Appeal

No. 70–20. CANNIFFE ET AL. *v.* BURG. Affirmed on appeal from D. C. Mass. Reported below: 315 F. Supp. 380.

No. 70–80. DAVIS, GOVERNOR OF VERMONT, ET AL. *v.* KOHN ET UX. Affirmed on appeal from D. C. Vt. Reported below: 320 F. Supp. 246.

No. 71–628. CODY, ELECTIONS COMMISSIONER, ET AL. *v.* ANDREWS ET UX. Affirmed on appeal from D. C. M. D. N. C. Reported below: 327 F. Supp. 793.

No. 70–76. DONOVAN, SECRETARY OF STATE OF MINNESOTA, ET AL. *v.* KEPPEL ET AL. Affirmed on appeal from D. C. Minn. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this appeal. Reported below: 326 F. Supp. 15.

No. 70–51. WHITCOMB, GOVERNOR OF INDIANA, ET AL. *v.* AFFELDT ET UX. Appeal from D. C. N. D. Ind. Motion of appellees for leave to dispense with printing motion to affirm granted. Judgment affirmed. Reported below: 319 F. Supp. 69.

No. 70–59. AMOS, SECRETARY OF STATE OF ALABAMA, ET AL. *v.* HADNOTT ET AL. Appeal from D. C. M. D. Ala. Motion of appellees for leave to dispense with printing motion to affirm granted. Motion of appellants to dispense with printing jurisdictional statement granted. Judgment affirmed. Reported below: 320 F. Supp. 107.

No. 70–68. VIRGINIA STATE BOARD OF ELECTIONS *v.* BUFFORD ET AL. Appeal from D. C. E. D. Va. Motion of appellees for leave to dispense with printing motion to affirm granted. Judgment affirmed. Reported below: 319 F. Supp. 843.

No. 71–650. MINNESOTA *v.* NORTHERN STATES POWER CO. Affirmed on appeal from C. A. 8th Cir. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART dissent from affirmance. Reported below: 447 F. 2d 1143.

Appeals Dismissed

No. 71–674. LAKE SHORE AUTO PARTS CO. *v.* KORZEN ET AL. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 49 Ill. 2d 137, 273 N. E. 2d 592.

No. 71–950. GARRETT FREIGHTLINES, INC. *v.* UNITED STATES ET AL. Appeal from D. C. Colo. dismissed. *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U. S. 39 (1963). MR. JUSTICE DOUGLAS dissents from the dismissal of the case and would affirm, believing that the appeal is properly taken. Reported below: 339 F. Supp. 554.

No. 71–1039. ANDERSON ET AL. *v.* CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL. Appeal from Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Motion of appellants for leave to dispense with printing reply brief granted. Appeal dismissed for want of substantial federal question. Reported below: 467 S. W. 2d 205.

No. 71–1001. BERBERIAN *v.* RHODE ISLAND. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: — R. I. —, 284 A. 2d 590.

Vacated and Remanded on Appeal

No. 70–16. COCANOWER *v.* MARSTON, RECORDER FOR MARICOPA COUNTY, ET AL. Appeal from D. C. Ariz. Judgment vacated and case remanded for further consideration in light of *Dunn* v. *Blumstein, ante,* p. 330. Reported below: 318 F. Supp. 402.

No. 70–81. FITZPATRICK ET AL. *v.* BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO ET AL. Appeal from D. C. N. D. Ill. Judgment vacated and case remanded for further consideration in light of *Dunn* v. *Blumstein, ante,* p. 330.

No. 70–5076. LESTER ET AL. *v.* BOARD OF ELECTIONS FOR THE DISTRICT OF COLUMBIA ET AL. Appeal from D. C. D. C. Judgment vacated and case remanded for further consideration in light of *Dunn* v. *Blumstein, ante,* p. 330. Reported below: 319 F. Supp. 505.

No. 71–5690. FERGUSON ET AL. *v.* WILLIAMS, GOVERNOR OF MISSISSIPPI, ET AL. Appeal from D. C. N. D. Miss. Judgment vacated and case remanded for further consideration in light of *Dunn* v. *Blumstein, ante,* p. 330. Reported below: 330 F. Supp. 1012.

Certiorari Granted—Vacated and Remanded

No. 70–5080. WEDDLE *v.* DIRECTOR, PATUXENT INSTITUTION, ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Lynch* v. *Household Finance Corp., ante,* p. 538. Reported below: 436 F. 2d 342.

No. 70–5395. ROBERTS ET AL. *v.* HARDER, COMMISSIONER OF WELFARE OF CONNECTICUT. C. A. 2d Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Lynch* v. *Household Finance Corp., ante,* p. 538. Reported below: 440 F. 2d 1229.

Miscellaneous Orders

No. A–974. IN RE RESIGNATION OF GERBER. Albert B. Gerber, of Philadelphia, Pennsylvania, having resigned as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice in this Court.

No. 70–223. CENTRAL HARDWARE CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. [Certiorari granted, 404 U. S. 1014.] Motion of respondent Retail Clerks Union for additional time for oral argument granted and 10 minutes allotted for that purpose. Petitioner also allotted 10 additional minutes for oral argument.

No. 70–283. ADAMS, WARDEN *v.* WILLIAMS. C. A. 2d Cir. [Certiorari granted, 404 U. S. 1014.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 71–452. HEALY ET AL. *v.* JAMES ET AL. C. A. 2d Cir. [Certiorari granted, 404 U. S. 983.] Motion of Associated Students of San Francisco State College et al. for leave to file a brief as *amici curiae* denied.

No. 71–857. EVCO, DBA EVCO INSTRUCTIONAL DESIGNS *v.* JONES, COMMISSIONER OF BUREAU OF REVENUE, ET AL. Ct. App. N. M. [Certiorari granted, *ante,* p. 953.] Motion of petitioner to dispense with printing appendix and to proceed on original record granted.

No. 71–492. LLOYD CORP., LTD. *v.* TANNER ET AL. C. A. 9th Cir. [Certiorari granted, 404 U. S. 1037.] Motion of American Retail Federation for leave to participate in oral argument as *amicus curiae* denied.

No. 71–1016. FEDERAL POWER COMMISSION *v.* LOUISIANA POWER & LIGHT CO. ET AL.; and

No. 71–1040. UNITED GAS PIPE LINE CO. ET AL. *v.* LOUISIANA POWER & LIGHT CO. ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 973.] Motion of Mobile Gas Service Corp. et al. for leave to file a brief as *amici curiae* granted. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 71–1017. GRAVEL *v.* UNITED STATES; and

No. 71–1026. UNITED STATES *v.* GRAVEL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 916.] Motion of counsel for Gravel for additional time for oral argument denied. Motion of the United States Senate for leave to permit Sam J. Ervin, Jr., to participate in oral argument as *amicus curiae* granted and a total of 30 minutes allotted for that purpose. The Solicitor General is allotted 30 additional minutes for oral argument.

No. 71–1031. TONASKET *v.* WASHINGTON ET AL. Appeal from Sup. Ct. Wash. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 79 Wash. 2d 607, 488 P. 2d 281.

No. 71–5564. STEWART ET AL. *v.* WHITE ET AL., JUDGES. Motion for leave to file petition for writ of mandamus and/or prohibition and other relief denied.

Certiorari Granted

No. 71–889. COUCH *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 449 F. 2d 141.

No. 71–1022. UNITED STATES *v.* BASYE ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 450 F. 2d 109.

No. 71–685. LEHNHAUSEN, DIRECTOR, DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS OF ILLINOIS *v.* LAKE SHORE AUTO PARTS CO. ET AL.; and

No. 71–691. BARRETT, COUNTY CLERK OF COOK COUNTY, ILLINOIS, ET AL. *v.* SHAPIRO ET AL. Sup. Ct. Ill. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 49 Ill. 2d 137, 273 N. E. 2d 592.

No. 71–651. CALIFORNIA *v.* KRIVDA ET AL. Sup. Ct. Cal. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 5 Cal. 3d 357, 486 P. 2d 1262.

No. 71–951. ALMOTA FARMERS ELEVATOR & WAREHOUSE CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted and case set for oral argument with No. 71–559 [*United States* v. *Fuller*, certiorari granted, 404 U. S. 1037]. Reported below: 450 F. 2d 125.

*Certiorari Denied.** (See also Nos. 71–674 and 71–1001, *supra.*)

No. 68–5028. TYLER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 5 Md. App. 265, 246 A. 2d 634.

No. 70–5028. SCAIFE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 70–5036. PROWSE *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 70–5068. LUCAS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

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*[Reporter's Note: For statement of MR. JUSTICE BRENNAN and dissenting opinion of MR. JUSTICE DOUGLAS in No. 71–5912, *Williamson* v. *United States*, see *ante*, p. 1026.]

No. 70–5057. BILLINGS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 10 Md. App. 31, 267 A. 2d 808.

No. 70–5059. BARNER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 8 N. C. App. 1, 173 S. E. 2d 605.

No. 70–5148. OLSEN *v.* ELLSWORTH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 438 F. 2d 630.

No. 71–642. PARROTT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 27 Ohio St. 2d 205, 272 N. E. 2d 112.

No. 71–813. FAVRO *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 5 Wash. App. 311, 487 P. 2d 261.

No. 71–817. CARDENAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–836. WOOD ET AL. *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 94 Idaho 612, 495 P. 2d 18.

No. 71–840. BORING *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 253 So. 2d 251.

No. 71–923. CECIRE ET AL., TRUSTEES *v.* STEWART, SUPERINTENDENT OF INSURANCE. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 2d 563, 272 N. E. 2d 887.

No. 71–944. SALETKO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 193.

No. 71–957. SHALLA *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 71–959. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 2d 334.

No. 71–971. FISONS LTD. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 458 F. 2d 1241.

No. 71–974. CONRAD, EXECUTRIX *v.* JUDSON ET AL. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 465 S. W. 2d 819.

No. 71–988. VAUGHN *v.* HUFNAGEL, EXECUTOR, ET AL. Ct. App. Ky. Certiorari denied. Reported below: 473 S. W. 2d 124.

No. 71–996. SNOOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 329.

No. 71–1004. GENERAL TEAMSTERS LOCAL UNION No. 528 ET AL. *v.* ALLIED FOODS, INC. Sup. Ct. Ga. Certiorari denied. Reported below: 228 Ga. 479, 186 S. E. 2d 527.

No. 71–1018. MALONEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 452 F. 2d 1186.

No. 71–1029. REISMAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 2d 278, 277 N. E. 2d 396.

No. 71–1033. GREAT DANE TRAILERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied.

No. 71–1034. EMBRY *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 451 F. 2d 472.

No. 71–1037. SILVERTRUST, EXECUTOR, ET AL. *v.* REDKE. Sup. Ct. Cal. Certiorari denied. Reported below: 6 Cal. 3d 94, 490 P. 2d 805.

No. 71–1038. CITY OF THOUSAND OAKS *v.* VAN NUYS PUBLISHING CO., INC. Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 3d 817, 489 P. 2d 809.

No. 71–1046. GRIFFITH *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 47 Ala. App. 378, 255 So. 2d 48.

No. 71–1055. ANDERSON *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: —— Colo. ——, 490 P. 2d 47.

No. 71–1079. HAY *v.* TRUSCOTT ET AL. Sup. Ct. Pa. Certiorari denied.

No. 71–5035. SAMPERI *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 71–5309. JORDAN *v.* PROCUNIER, CORRECTIONS DIRECTOR. Sup. Ct. Cal. Certiorari denied.

No. 71–5355. MOSES *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 445 F. 2d 306.

No. 71–5465. CROSSWHITE *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 444 F. 2d 648.

No. 71–5585. MARTIN *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 71–5587. PLAIR *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–5755. MONSOUR *v.* CADY, WARDEN, ET AL. Sup. Ct. Wis. Certiorari denied.

No. 71–5964. LAUCHLI *v.* HARRIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 71–5965. BETHEA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 18 Cal. App. 3d 930, 96 Cal. Rptr. 229.

No. 71–5967. JENSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 1258.

No. 71–5968. HUGGINS *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 71–5969. BAMBERGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 452 F. 2d 696.

No. 71–5971. KIMMONS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 335.

No. 71–5973. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 451 F. 2d 169.

No. 71–5975. SAVAGE *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 450 F. 2d 449.

No. 71–5976. NICHOLSON *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 448 F. 2d 777.

No. 71–5977. ZOVLUCK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 339.

No. 71–5978. TINER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 71–5979. PACHECO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 448 F. 2d 1398.

No. 71–5980. WATTS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 71–5981. PELOW *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5982. MARCELIN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 71–5984. WALKER *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 71–5986. CARLSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–5987. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–5993. DADURIAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 450 F. 2d 22.

No. 71–5994. FENTRESS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 133 Ill. App. 2d 38, 272 N. E. 2d 801.

No. 71–5995. BREWER *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 71–5997. ARCHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 450 F. 2d 1106.

No. 71–5999. MASTERS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 866.

No. 71–6000. DUNLEAVAY *v.* ROCKEFELLER CENTER, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 447 F. 2d 1402.

No. 71–6002. WOOD *v.* CIRCUIT COURT OF WARREN COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 71–6003. STRICKLAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6004. HOOKS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 253 So. 2d 424.

No. 71–6005. EVANS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6006. MAGGARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 502.

No. 71–6007. FENTRESS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 452 F. 2d 609.

No. 71–6008. LAUCHLI *v.* POOS, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied.

No. 71–6009. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 344.

No. 70–22. M. F. A. CENTRAL COOPERATIVE ET AL. *v.* BOOKWALTER, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 427 F. 2d 1341.

No. 71–525. LUSBY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be granted.

No. 71–716. SMITHERMAN *v.* VIRGINIA. Sup. Ct. Va. Motion to dispense with printing petition and motion of respondent for leave to dispense with printing brief granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–766. CARTER, DIRECTOR, MISSOURI DIVISION OF WELFARE, ET AL. *v.* LIKE ET AL. C. A. 8th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 448 F. 2d 798.

No. 71–978. McConnell *v.* Anderson et al. C. A. 8th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 193.

No. 71–994. Epstein *v.* Association of the Bar of the City of New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 37 App. Div. 2d 333, 325 N. Y. S. 2d 657.

No. 71–995. Davis *v.* United States. Ct. Cl. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 196 Ct. Cl. 517.

No. 71–1054. Smith, Administratrix *v.* Southern Pacific Co. Ct. App. Cal., 1st App. Dist. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted.

No. 71–5449. Quick *v.* Virginia. Sup. Ct. Va. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted.

No. 71–5450. Camm *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 443 Pa. 253, 277 A. 2d 325.

No. 71–5550. Manuel *v.* Salisbury, Correctional Superintendent. C. A. 6th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 446 F. 2d 453.

No. 71–5970. Nielsen *v.* Michigan. Ct. App. Mich. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Reported below: 34 Mich. App. 261, 191 N. W. 2d 121.

No. 71–5560. MILLER *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: See 5 Ore. App. 501, 484 P. 2d 1132.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL, dissenting.

Petitioner had a pistol on his person when he was arrested in Portland, Oregon, on January 28, 1970. Two prosecutions were brought against him based on this single act of possession. The first was a complaint filed January 29, 1970, for violation of § 14.32.040 of the Code of the City of Portland, which makes it a crime to carry a concealed weapon. The second was an indictment handed down April 20, 1970, for violation of Oregon Revised Statutes § 166.270, whch makes it a felony for "any person who has been convicted of a felony against the person or property of another" to carry a concealed weapon.

On April 29, 1970, the petitioner was convicted of the ordinance violation. He thereupon entered a plea of double jeopardy to the felony indictment. The plea was sustained in the trial court and the indictment dismissed. The Court of Appeals of Oregon reversed, 5 Ore. App. 501, 484 P. 2d 1132. The Oregon Supreme Court denied review.

I would grant the petition for certiorari and reverse. In my view the Double Jeopardy Clause applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), requires the prosecution, except in most limited circumstances not present here, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (concurring opinion). Under this "same transaction" test of "same offense" the trial court properly sustained petitioner's double jeopardy plea.

No. 71–993. LOVISI *v.* VIRGINIA. Sup. Ct. Va. Motion of respondent to dispense with printing brief granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5726. HUNT, AKA ADAMS *v.* GEORGIA ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 445 F. 2d 1228.

No. 71–5989. THERIAULT ET AL. *v.* SILBER ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 71–5990. SINCLAIR *v.* TURNER, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 447 F. 2d 1158.

Rehearing Denied

No. 71–554. LIEPMAN *v.* CALIFORNIA, *ante*, p. 963;

No. 71–657. HAWAIIAN LAND CO., LTD. *v.* DIRECTOR OF TAXATION OF HAWAII, *ante*, p. 907;

No. 71–694. LOUISIANA STATE DEPARTMENT OF HIGHWAYS *v.* DARDAR ET AL., *ante*, p. 918;

No. 71–709. SUMIDA ET AL. *v.* YUMEN ET AL., *ante*, p. 964;

No. 71–730. WILLIAMS *v.* UNITED STATES, *ante*, p. 954;

No. 71–742. GOULD ET UX. *v.* AMERICAN WATER WORKS SERVICE CO., INC., ET AL., *ante*, p. 920;

No. 71–744. ADDONIZIO *v.* UNITED STATES, *ante*, p. 936; and

No. 71–765. NORTHERN NATURAL GAS CO. *v.* WILSON ET AL., *ante*, p. 949. Petitions for rehearing denied.

No. 71–789. JACOBS *v.* UNITED STATES, *ante*, p. 955;

No. 71–796. KASTENBAUM *v.* UNITED STATES, *ante*, p. 955;

No. 71–904. GREAT FIDELITY INVESTMENT CO. ET AL. *v.* MARTIN ET AL., *ante*, p. 955;

No. 71–5470. BEASLEY *v.* UNITED STATES, *ante*, p. 952;

No. 71–5547. MCCRAY *v.* UNITED STATES, *ante*, p. 944;

No. 71–5582. GERARDI *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL., *ante*, p. 914;

No. 71–5588. TARLTON *v.* UNITED STATES, *ante*, p. 926;

No. 71–5718. BECKER *v.* UNITED STATES, *ante*, p. 932; and

No. 71–5738. ACARINO *v.* MISHLER, CHIEF JUDGE, U. S. DISTRICT COURT, *ante*, p. 956. Petitions for rehearing denied.

No. 70–6. SWARB ET AL. *v.* LENNOX ET AL., *ante*, p. 191. Petition for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 71–884. CHANDLER, U. S. DISTRICT JUDGE *v.* O'BRYAN, *ante*, p. 964. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Seventh Circuit during the week of May 22, 1972, and for such additional time in advance thereof to prepare for the hearing of cases, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

April 7, 1972

Dismissal Under Rule 60

No. 71–1050. Roberts, aka Matthews *v.* United States. C. A. 5th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 455 F. 2d 930.

April 11, 1972

Miscellaneous Order

No. A–972 (71–982). Hall, Secretary of Human Relations Agency, et al. *v.* Villa et al. Sup. Ct. Cal. Application for stay of judgment pending action on petition for writ of certiorari presented to Mr. Justice Blackmun, and by him referred to the Court, granted. Mr. Justice Marshall took no part in the consideration or decision of this application.

April 17, 1972

Affirmed on Appeal

No. 71–940. Brusca et al. *v.* State Board of Education et al. Affirmed on appeal from D. C. E. D. Mo. Reported below: 332 F. Supp. 275.

Appeals Dismissed

No. 71–793. Anderson et al. *v.* Maryland. Appeal from Ct. Sp. App. Md. dismissed for want of substantial federal question. Mr. Justice Douglas is of the opinion that probable jurisdiction should be noted. Reported below: 12 Md. App. 186, 278 A. 2d 439.

No. 71–5974. Morris *v.* Georgia. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 228 Ga. 39, 184 S. E. 2d 82.

No. 71–6067. DIGGS *v.* BENJAMIN FRANKLIN UNIVERSITY. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71–6082. RENER *v.* BETO, CORRECTIONS DIRECTOR. Appeal from C. A. 5th Cir. Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 447 F. 2d 20.

Vacated and Remanded on Appeal

No. 70–44. ROTHSTEIN *v.* LUTHERAN SOCIAL SERVICES OF WISCONSIN AND UPPER MICHIGAN. Appeal from Sup. Ct. Wis. Motion to strike appellant's supplemental brief denied. Judgment vacated and case remanded for further consideration in light of *Stanley* v. *Illinois, ante,* p. 645, and with due consideration for the completion of adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time. Reported below: 47 Wis. 2d 420, 178 N. W. 2d 56.

No. 71–9. LUNG ET AL. *v.* JONES ET AL. Appeal from D. C. N. M. Judgment vacated and case remanded for further consideration in light of *Lynch* v. *Household Finance Corp., ante,* p. 538. Reported below: 322 F. Supp. 1067.

Certiorari Granted—Vacated or Reversed, and Remanded

No. 70–123. VANDERLAAN *v.* VANDERLAAN. App. Ct. Ill., 1st Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Stanley* v. *Illinois, ante,* p. 645. Reported below: 126 Ill. App. 2d 410, 262 N. E. 2d 717.

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No. 70–142. GARREN ET AL. *v.* CITY OF WINSTON-SALEM. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lynch* v. *Household Finance Corp., ante,* p. 538. Reported below: 439 F. 2d 140.

No. 70–249. TUCKER *v.* MAHER ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lynch* v. *Household Finance Corp., ante,* p. 538. Reported below: 441 F. 2d 740.

No. 71–5580. GONZALES *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment reversed and case remanded. *Turner* v. *Louisiana,* 379 U. S. 466. Reported below: 445 F. 2d 1202.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring in the judgment.

A gas station attendant was shot to death during the course of a holdup in Dawson County, Texas, on a February night in 1956. Five years later the petitioner was arrested, tried, and convicted of the crime. The prosecution's case against the petitioner rested almost totally upon the testimony of the county sheriff. The sheriff testified to the authenticity of a written confession that he said had been dictated and signed with an "X" by the petitioner. The witness insisted on cross-examination that, although the petitioner could not read or write, and had some difficulty speaking and understanding English, he had indeed dictated the rather complex confession and had understood what he was signing. Only one other witness, who corroborated a part of the sheriff's testimony, connected the petitioner with the crime.

The county sheriff, however, played a dual role at the trial, for he was not only the key prosecution witness

against the petitioner, but the bailiff of the jury as well. In the latter capacity, he was responsible for the care and protection of the jurors. He had, therefore, substantial and continuing contact with and authority over them during the entire course of the trial. On several occasions, he conducted them in and out of the courtroom on the instructions of the judge. Once, the judge even asked him to step down from the witness stand, where he was undergoing cross-examination, in order to retire the jury.[1] In his role as bailiff, the sheriff walked with the jurors to a local restaurant for lunch, conversing with them on the way. At the restaurant, he ate with them in a private room, where the conversations continued. Late in the afternoon, while the jurors were deliberating in the case that turned so largely on their assessment of the sheriff's credibility, they asked the sheriff, as bailiff, to bring them soft drinks in the jury room, which he did.

The petitioner has now sought federal habeas corpus relief, claiming that the sheriff's dual role as key prosecution witness and jury bailiff and his substantial association with the jurors during the trial infringed the petitioner's right to due process of law under the doctrine of *Turner* v. *Louisiana*, 379 U. S. 466. In *Turner*, two deputy sheriffs served identical dual roles as prosecution witnesses and jury custodians, testifying as to the circum-

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[1] This occurred immediately after defense counsel had emphasized his challenge to the sheriff's credibility:

"MR. BASDEN [defense counsel]: I have no further questions to ask this witness [the sheriff], and I will pass him. If this statement [the confession] is introduced in evidence, I would like to put on testimony to impeach the testimony given by this witness to assist the Court in understanding the defendant's ability to speak the English language, in regard to giving a statement to these Peace Officers, and I would like to make this request, to be allowed to call these witnesses of mine at this time to testify.

"THE COURT: Mr. Sheriff, will you retire the jury for a few minutes?"

stances of the defendant's confession while shepherding the jurors through a three-day trial. During the trial, the jury was sequestered and was in "close and continual association" with the deputies. *Id.*, at 468. "The deputies ate with them, conversed with them, and did errands for them." *Ibid.* This Court held that the prejudice inherent in that situation violated the defendant's due process right to a fair trial before an impartial jury.

After the evidentiary hearing in the present case, the District Court denied the petitioner's habeas corpus application. A divided Court of Appeals affirmed the denial. 445 F. 2d 1202. Both courts held that the particular facts of the petitioner's case distinguished it from *Turner*, since the association of the key prosecution witness with the jurors as their custodian during the petitioner's one-day trial was somewhat less extensive and somewhat less intense than the association of the deputy sheriffs with the sequestered jury during the three-day trial in *Turner*.[2]

Turner, of course, did not set down a rigid, *per se* rule automatically requiring the reversal of any conviction whenever any Government witness comes into any contact with the jury. The Court's opinion specifically indicated that association with the jury by a witness whose testimony was "confined to some uncontroverted or merely formal aspect of the case for the prosecution" would hardly present a constitutional problem. *Id.*, at 473. And it indicated that a mere "brief encounter," by chance, with the jury would not generally contravene

[2] Neither the District Court nor the Court of Appeals questioned that the county sheriff whose credibility was at issue had been a key witness for the prosecution. Indeed, the District Court's unreported opinion specifically found, as summarized by the Court of Appeals, that "[t]he sheriff was an essential witness for the prosecution in that his testimony, although disputed, established the voluntary character of the confession upon which Gonzales was convicted." 445 F. 2d, at 1205.

due process principles. *Ibid.* For, as pointed out in dissent today, certain chance contacts between witnesses and jury members, while passing in the hall or crowded together in an elevator, are often inevitable.

But the Court in *Turner* was not dealing with just any prosecution witness coming into any contact with the jury. Rather, it was dealing with crucial witnesses against the defendant who associated with the jurors as their official guardians throughout the trial. *Turner* established the simple principle that association of that particular sort cannot be permitted if criminal defendants are to be afforded due process of law.

At the heart of our holding in *Turner* lay a recognition of the great prejudice inherent in the dual role of jury bailiff and key prosecution witness:

> "It would have undermined the basic guarantees of trial by jury to permit this kind of an association between the jurors and two key prosecution witnesses who were *not* deputy sheriffs. But the role that Simmons and Rispone played as deputies made the association even more prejudicial. For the relationship was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial." *Id.*, at 474.[3]

Our adversary system of criminal justice demands that the respective roles of prosecution and defense and the neutral role of the court be kept separate and distinct in a criminal trial. When a key witness against a defendant doubles as the officer of the court specifically charged with the care and protection of the jurors, associating with them on both a personal and an official basis while

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[3] In a later case drawing upon the doctrine of *Turner*, the Court emphasized that "the official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury . . . ." *Parker* v. *Gladden*, 385 U. S. 363, 365.

simultaneously testifying for the prosecution, the adversary system of justice is perverted.

Naturally, the extent and intensity of a bailiff's association with a jury will vary from case to case. But, in the petitioner's case, I cannot say that it was by any means *de minimis*. Although the trial lasted only one day and the jury was not sequestered with the county sheriff, the association between the jurors and the witness-bailiff was an extended one, and the duality of the witness-bailiff's roles was inevitably driven home to the jury. And, although the witness-bailiff may not have spoken to the jurors about the case itself outside the courtroom, *Turner* makes clear that even if he "never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this association throughout the trial between the jurors and [this] key witness for the prosecution." 379 U. S., at 473. It is enough to bring the petitioner's case within the four corners of *Turner* that the key witness for the prosecution also served as the guardian of the jury, associating extensively with the jurors during the trial.[4]

MR. JUSTICE REHNQUIST, whom MR. JUSTICE WHITE joins, dissenting.

In order to reverse summarily the state court conviction of a confessed murderer, the majority in this case chooses to convert a salutary principle into a rigid rule

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[4] The petitioner's trial was held before our decision in *Turner*, but *Turner*, of course, stated no new constitutional doctrine. Its principle "went to the fairness of the trial—the very integrity of the fact-finding process." *Linkletter* v. *Walker*, 381 U. S. 618, 639. It overruled no line of decisions on which the State might have justifiably relied. To the contrary, it simply applied established case law holding that due process of law requires an impartial jury. *Turner* v. *Louisiana*, 379 U. S. 466, 471–472.

unjustified by considerations of constitutional policy or fairness. I must respectfully dissent.

Petitioner Rudy Gonzales was convicted of murder after a trial by jury in the District Court of Dawson County, Texas. The case was not a complicated one. The State's evidence consisted primarily of petitioner's signed and witnessed confession, admitting his complicity in an armed robbery and murder of the proprietor of a local service station. The evidence showed that the police had warned petitioner of his rights before he made this confession, and there is no suggestion that the statement was in any way coerced.

In cross-examining the sheriff who obtained the confession, petitioner's counsel questioned whether petitioner's command of the English language had been sufficient for him to understand what occurred at the time of the confession. The sheriff responded that while petitioner had not spoken perfect English, he had been able to comprehend and answer sensibly all the sheriff's questions. The defense presented no evidence to the jury, which found petitioner guilty within 10 minutes after the close of the case.

Petitioner's sole claim to habeas relief is that he was deprived of due process of law because the sheriff of Dawson County at that time also served as bailiff of the jury. In order to sustain this claim, petitioner seeks to have this Court extend the doctrine of *Turner* v. *Louisiana*, 379 U. S. 466 (1965).

In *Turner*, two deputy sheriffs who testified as to the circumstances of the defendant's confession served as jury bailiffs throughout the three-day trial. During this period the jury was sequestered and was in "close and continual association" with the deputies. *Id.*, at 468. "The deputies ate with them, conversed with them, and did errands for them." *Ibid.* Defendant's counsel repeatedly argued against this practice at trial, but the

trial judge refused to halt the deputy sheriffs' association with the jury. Under such circumstances, this Court found a denial of due process and reversed the convictions.

Turner did not, however, establish a rigid, *per se* rule automatically requiring the reversal of any conviction whenever a Government witness comes into contact with the jury. Indeed, certain chance contacts between witnesses and jury members—while passing in the hall or crowded together in an elevator—may be inevitable. Although such contacts may be undesirable, as Judge Learned Hand stated, "when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity." *United States* v. *Compagna*, 146 F. 2d 524, 528 (CA2 1944), cert. denied, 324 U. S. 867 (1945).

The Court in *Turner* recognized that there is a continuum of potential prejudice resulting from different types of contacts. It emphasized that the case before it dealt "not with a brief encounter, but with a continuous and intimate association throughout a three-day trial." 379 U. S., at 473. The Court granted relief only after analyzing the specific factors that might have resulted in prejudice to the defendant.

In the instant case it is undisputed that the sheriff never discussed the case with any member of the jury. As bailiff he escorted the jury to the jury room on several occasions. After the jury had found petitioner guilty and while it was considering the penalty, the sheriff responded to the jury's request for some soft drinks. This contact with the jury consisted solely of the sheriff walking into the room, placing the bottles on the table, and immediately leaving the room. There was no conversation beyond an exchange of formal pleasantries. Finally, and perhaps most significantly, the sheriff accompanied the jury to lunch.

As *Turner* noted, under certain circumstances a series of such informal contacts between witness and jury can be prejudicial. A jury member is more likely to question the credibility of an unknown Government witness than that of a person whom he has come to know and like after extended association. But in the present case the sheriff's contacts with the jury were far less prejudicial than in *Turner*. First, viewed quantitatively, the amount of contact involved here appears closer to a "brief encounter" than to the "continuous and intimate association" emphasized there, where the jury was sequestered with those witnesses for three days. Secondly, it is important to note that this is not a case where jurors became personally acquainted with the sheriff because of his role as bailiff. Indeed, prior to the trial which took place in Lamesa, Texas, a town of only about 13,000 people, the sheriff knew personally every single member of the jury. I find it impossible to conclude on this record that the sheriff's casual lunchtime conversation with people he already knew deprived petitioner of his constitutional rights.

By applying the *Turner* principle to the facts of this case, the Court converts *Turner*'s pragmatic approach into an almost insurmountable *per se* rule. Yet, this case decisively demonstrates the error of following such a quasi-legislative approach. After the decision in *Turner*, the Texas Legislature passed a statute forbidding a Government witness to serve as bailiff. Tex. Code Crim. Proc. Art. 36.24. This statute had prospective application only, and thus did not affect Gonzales' trial, which had taken place in 1961. In this manner the legislature was able to prevent a problem from arising in the future, without adopting a blunderbuss approach which would upset final convictions whose reliability and fairness could not reasonably be questioned. The legislators left to the courts the job of reviewing

past cases, using the more practical, flexible *Turner* approach.

Applying this case-by-case approach, it is hard to discern any unfairness in Gonzales' trial. Indeed, unlike *Turner*, Gonzales' counsel never raised any objection at trial to the sheriff's activities, although they were completely open and obvious. While this failure to object might not preclude petitioner's raising the issue now, it does seem to indicate a recognition at the time by all concerned that there was not in fact any dangerous objectionable impropriety taking place.

Today's ruling bids fair to swell the ever-mounting volume of constitutional litigation with which the courts of this country must deal. *Turner*'s reliance on *Irvin* v. *Dowd*, 366 U. S. 717 (1961), leaves open the inference that the gist of the claim of constitutional deprivation depends, not on the fact that the particular State's witness was a custodian of the jury, but on the fact that the State presumably failed to insulate the jury from all contact with the State's witnesses during the trial. Thus all of the unintended but virtually inevitable contacts between the State's witnesses, prosecuting attorneys, and the jurors during trial recesses could become potential constitutional infirmities in a conviction. Today's decision may well convert into Fifth or Fourteenth Amendment claims many matters that have in the past been dealt with quite satisfactorily by the trial judge determining on a motion for mistrial whether or not there was prejudice. Cases dealing with the issue in the past do not suggest that juror-witness contacts automatically raise issues of constitutional dimension. See, *e. g.*, *Jordan* v. *United States*, 133 U. S. App. D. C. 102, 408 F. 2d 1305 (1969); *State* v. *Miles*, 364 S. W. 2d 532 (Mo. 1963). See generally Annot., 9 A. L. R. 3d 1275 (1966).

After revealing the activities of the deputy sheriffs in *Turner*, 379 U. S., at 473, the Court stated that "it

would be blinking reality" to ignore the inherent prejudice there. In my view, it is "blinking reality" to hold that petitioner here was denied a substantial constitutional right at the trial of his case. The Court having determined that this matter should be treated summarily and without argument, I would affirm.

Miscellaneous Orders

No. 776, October Term, 1968. UTAH PUBLIC SERVICE COMMISSION *v.* EL PASO NATURAL GAS CO. ET AL., 395 U. S. 464. Motion for modification of mandate (judgment) and other relief denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 70–223. CENTRAL HARDWARE CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. [Certiorari granted, 404 U. S. 1014.] Motion of American Retail Federation for leave to participate in oral argument as *amicus curiae* denied.

No. 70–250. CARLESON, DIRECTOR, DEPARTMENT OF SOCIAL WELFARE, ET AL. *v.* REMILLARD ET AL. [Probable jurisdiction noted, 404 U. S. 1013.] Motion of National Welfare Rights Organization et al. for leave to file a brief as *amici curiae* denied.

No. 71–485. GOTTSCHALK, ACTING COMMISSIONER OF PATENTS *v.* BENSON ET AL. C. C. P. A. [Certiorari granted, *ante*, p. 915.] Motion of petitioner to dispense with printing appendix and to proceed on original record granted. MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 71–506. UNITED STATES ET AL. *v.* MIDWEST VIDEO CORP. C. A. 8th Cir. [Certiorari granted, 404 U. S. 1014.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 71–732. SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT *v.* BUSTAMONTE. C. A. 9th Cir. [Certiorari granted, *ante*, p. 953.] Motion of respondent for appointment of counsel granted. It is ordered that Stuart P. Tobisman, Esquire, of Los Angeles, California, be, and he is hereby, appointed to serve as counsel for respondent *pro hac vice* in this case.

No. 71–829. MOURNING *v.* FAMILY PUBLICATIONS SERVICE, INC. C. A. 5th Cir. [Certiorari granted, *ante*, p. 987.] Motion of petitioner for leave to proceed further herein *in forma pauperis* granted.

No. 71–1016. FEDERAL POWER COMMISSION *v.* LOUISIANA POWER & LIGHT CO. ET AL.; and

No. 71–1040. UNITED GAS PIPE LINE CO. ET AL. *v.* LOUISIANA POWER & LIGHT CO. ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 973.] Motions of Atlanta Gas Light Co. et al., Monsanto Co. et al., and Humble Oil & Refining Co. for leave to file briefs as *amici curiae* granted. Motions of State of Louisiana, Humble Oil & Refining Co., and Mobile Gas Service Corp. et al. for leave to participate in oral argument as *amici curiae* denied. MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 71–1017. GRAVEL *v.* UNITED STATES; and

No. 71–1026. UNITED STATES *v.* GRAVEL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 916.] Motion requesting permission to divide time for oral argument on behalf of *amicus curiae* granted.

No. A–962 (71–1248). CALIFORNIA *v.* ANDERSON. Sup. Ct. Cal. Renewed application for stay denied.

No. 71–5671. GIDMARK *v.* BENSON, PRISON CAMP ADMINISTRATOR. Motion for leave to file petition for writ of habeas corpus denied. MR. JUSTICE DOUGLAS is of the opinion that the motion should be granted.

No. 71–6019. BLACKBURN *v.* HENDERSON, WARDEN; and

No. 71–6077. NIDIVER *v.* FIELD, MEN'S COLONY SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71–983. ALBRECHT *v.* MATTHES, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL.;

No. 71–6040. ROJAS *v.* CHAMBERS, CHIEF JUDGE, U. S. COURT OF APPEALS;

No. 71–6055. MCCRAY *v.* MARYLAND;

No. 71–6088. GIBSON *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA ET AL.;

No. 71–6096. GAY *v.* DOWNING ET AL.; and

No. 71–6110. PICKING *v.* KAUFMAN, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 71–6098. ARNOLD *v.* UNITED STATES. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 71–1082. ASKEW, GOVERNOR OF FLORIDA, ET AL. *v.* AMERICAN WATERWAYS OPERATORS, INC., ET AL. Appeal from D. C. M. D. Fla. Probable jurisdiction noted. Reported below: 335 F. Supp. 1241.

No. 71–364. MAHAN, SECRETARY OF BOARD OF ELECTIONS, ET AL. *v.* HOWELL ET AL.;

No. 71–373. CITY OF VIRGINIA BEACH *v.* HOWELL ET AL.; and

No. 71–553. THORNTON ET AL. *v.* PRICHARD ET AL. Appeals from D. C. E. D. Va. Probable jurisdiction noted. Cases consolidated and a total of two hours allotted for oral argument. MR. JUSTICE POWELL took no part in the consideration or decision of these cases. Reported below: 330 F. Supp. 1138.

No. 71–6078. LINDA R. S. *v.* RICHARD D. ET AL. Appeal from D. C. N. D. Tex. Motion of appellants for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 335 F. Supp. 804.

Certiorari Granted

No. 71–1011. BRONSTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Reported below: 453 F. 2d 555.

No. 71–1059. KERN COUNTY LAND CO. *v.* OCCIDENTAL PETROLEUM CORP. C. A. 2d Cir. Certiorari granted. Reported below: 450 F. 2d 157.

Certiorari Denied. (See also Nos. 71–5974, 71–6067, and 71–6082, *supra.*)

No. 70–284. PENNSYLVANIA *v.* SILVERMAN. Sup. Ct. Pa. Certiorari denied. Reported below: 442 Pa. 211, 275 A. 2d 308.

No. 71–851. WRENN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 12 N. C. App. 146, 182 S. E. 2d 600.

No. 71–861. LEFF ET AL. *v.* HOUSING AUTHORITY OF THE CITY OF EAST ORANGE ET AL. Super. Ct. N. J. Certiorari denied.

No. 71–914. BRAVER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 799.

No. 71–918. LOVE ET AL. *v.* DADE COUNTY SCHOOL BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 447 F. 2d 150.

No. 71–947. VUCI ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 940.

No. 71–963. BBF LIQUIDATING, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 938.

No. 71–969. CENTURY ARMS, INC. *v.* CONNALLY, SECRETARY OF THE TREASURY. C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 1306.

No. 71–972. COCHRAN *v.* COSTILL ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 71–998. PENOSI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 217.

No. 71–1006. VIRGINIA NATIONAL BANK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 450 F. 2d 1155.

No. 71–1007. REGENCY REALTY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied.

No. 71–1025. HENRY COUNTY BEVERAGE CO., INC. *v.* SECRETARY OF THE TREASURY. C. A. 7th Cir. Certiorari denied: Reported below: 454 F. 2d 413.

No. 71–1032. A. W. THOMPSON, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 449 F. 2d 1333.

No. 71–1036. LECCI *v.* LEONARD ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 71–1062. PROCTER & GAMBLE CO. *v.* PUREX CORP., LTD. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 288.

No. 71–1073. TRAP ROCK INDUSTRIES, INC. *v.* KOHL, COMMISSIONER OF TRANSPORTATION, ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 59 N. J. 471, 284 A. 2d 161.

No. 71–1067. RILEY ET AL. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 283 A. 2d 819.

No. 71–1071. SAIKEN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 49 Ill. 2d 504, 275 N. E. 2d 381.

No. 71–1074. BIXLER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 49 Ill. 2d 328, 275 N. E. 2d 392.

No. 71–1075. FERSHTMAN ET AL. *v.* SCHECTMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 1357.

No. 71–1076. EMERY AIR FREIGHT CORP. *v.* LOCAL UNION 295, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 449 F. 2d 586.

No. 71–1081. KEARNEY & TRECKER CORP. *v.* GIDDINGS & LEWIS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 452 F. 2d 579.

No. 71–1089. CALIFORNIA SHIPPING CO., INC., ET AL. *v.* PACIFIC FAR EAST LINE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 380.

No. 71–1096. MILES *v.* CITY-PARISH GOVERNMENT OF EAST BATON ROUGE PARISH ET AL. Sup. Ct. La. Certiorari denied. Reported below: 260 La. 108, 255 So. 2d 93.

No. 71–1108. NEWSOME ET AL. *v.* MASON & HANGER-SILAS MASON CO., INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 2d 425.

No. 71–5364. ARMSTEAD ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 71–1118. FORD MOTOR CO. *v.* W. F. HOLT & SONS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 2d 116.

No. 71–1203. BANCO POPULAR DE PUERTO RICO *v.* LAS COLINAS, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 453 F. 2d 911.

No. 71–5516. WEDDEL *v.* CRAVEN, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 71–5517. WEDDEL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71–5645. ANDRADE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 470 S. W. 2d 194.

No. 71–5652. GLOVER *v.* FLORIDA. Ct. of Record of Escambia County. Certiorari denied.

No. 71–5682. O'DELL *v.* OHIO STATE MEDICAL BOARD. Ct. App. Ohio, Clermont County. Certiorari denied. Reported below: See 22 Ohio Misc. 138, 259 N. E. 2d 167.

No. 71–5693. REID *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 71–5719. STANDIFER *v.* JARVIS ET AL. C. A. 10th Cir. Certiorari denied.

No. 71–5730. MEREDITH *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–5742. SIMS ET AL. *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 385 Mich. 621, 189 N. W. 2d 41.

No. 71–5787. JACKSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 470 S. W. 2d 201.

No. 71–5731. STUARD *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–6010. JACKSON *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–6012. JACKSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 289.

No. 71–6013. EVANS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 71–6015. GOZNELLI *v.* BRANTLEY, WARDEN. Sup. Ct. Ill. Certiorari denied. Reported below: 49 Ill. 2d 383, 275 N. E. 2d 396.

No. 71–6016. GUILE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–6018. CLOSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 450 F. 2d 152.

No. 71–6020. SUNDLUN *v.* SUNDLUN. Sup. Ct. R. I. Certiorari denied. Reported below: 108 R. I. 603, 277 A. 2d 918.

No. 71–6021. BOLTON *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–6022. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–6024. WARNER *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 187 Neb. 335, 190 N. W. 2d 786.

No. 71–6025. HOOD *v.* BURNETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 941.

No. 71–6026. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6027. BROWN *v.* ROSS, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 71–6028. ROSS *v.* HOWARD, WARDEN. Sup. Ct. R. I. Certiorari denied.

No. 71–6031. STRATTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 2d 36.

No. 71–6032. PATTON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 275 N. E. 2d 794.

No. 71–6033. STEPHENSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 768.

No. 71–6036. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 760.

No. 71–6038. WALTENBERG *v.* SUPREME COURT OF RICHMOND COUNTY ET AL. C. A. 2d Cir. Certiorari denied.

No. 71–6039. PICKETT *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–6041. TATE *v.* GRACE ET AL. C. A. 6th Cir. Certiorari denied.

No. 71–6044. WILSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 2d 356.

No. 71–6045. RODGERS *v.* GAFFNEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 71–6046. LUCAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 141.

No. 71–6047. MAHLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 452 F. 2d 547.

No. 71–6048. MEDINA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 452 F. 2d 1090.

No. 71–6049. MATTISON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–6052. GEORGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 269.

No. 71–6053. MAGEE *v.* NELSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–6054. EVINS *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 71–6057. DOUGHERTY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 71–6058. AUGELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 451 F. 2d 1167.

No. 71–6061. HUME *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 339.

No. 71–6062. CAPPS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6063. FULLY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 452 F. 2d 1012.

No. 71–6064. PARSONS *v.* ADAMS, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 456 F. 2d 257.

No. 71–6065. BYLAND *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 71–6066. SULLIVAN *v.* SULLIVAN. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–6069. SMILEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–6072. PARKER *v.* LEWIS, U. S. DISTRICT JUDGE. C. A. 4th Cir. Certiorari denied.

No. 71–6075. WATT *v.* PAGE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 452 F. 2d 1174.

No. 71–6073. LATHAN *v.* DEEGAN, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 181.

No. 71–6076. THOMPSON *v.* STROM ET AL. C. A. 8th Cir. Certiorari denied.

No. 71–6079. BURROUGHS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–6080. LUCAS *v.* BROUGHTON. C. A. 2d Cir. Certiorari denied.

No. 71–6083. WILKERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 2d 657.

No. 71–6084. ARCHIE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 452 F. 2d 897.

No. 71–6086. LONG *v.* KLEINDIENST, ACTING ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 71–6087. CHAMBERS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 450 F. 2d 359.

No. 71–6089. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 451 F. 2d 559.

No. 71–6090. SPEAKS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 453 F. 2d 966.

No. 71–6091. JEFFRIES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–6092. HAGLER ET AL. *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied. Reported below: 451 F. 2d 45.

No. 71–6093. DEAN *v.* MOORE ET AL. C. A. 2d Cir. Certiorari denied.

No. 71–6094. WEBB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 446 F. 2d 760.

No. 71–6095. WHITE, AKA LITTLEJOHN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 264.

No. 71–6099. MARNIN *v.* URBANIAK ET AL. C. A. 3d Cir. Certiorari denied.

No. 71–6101. ADAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 454 F. 2d 1357.

No. 71–6102. SMOTHERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 451 F. 2d 995.

No. 71–6103. PLEASANT *v.* RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 749.

No. 71–6105. BREAUX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 948.

No. 71–6107. MARRATTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–6108. BACA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 451 F. 2d 1112.

No. 71–6111. BOSWELL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71–6113. JOHNSON *v.* DEPARTMENT OF WATER & POWER OF THE CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 294.

No. 71–6114. DENNIS *v.* McCRACKEN ET AL. Sup. Ct. Fla. Certiorari denied.

No. 71–6115. FREEMAN *v.* FIRST DISTRICT COURT OF APPEALS ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 71–758. GREEN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 470 S. W. 2d 565.

No. 71–797. PUGLIA *v.* COTTER ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 450 F. 2d 1362.

No. 71–962. KELLEY ET AL. *v.* TEXAS STATE BOARD OF MEDICAL EXAMINERS. Ct. Civ. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 467 S. W. 2d 539.

No. 71–1035. LECCI *v.* CAHN, DISTRICT ATTORNEY OF NASSAU COUNTY, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 37 App. Div. 2d 779, 325 N. Y. S. 2d 400.

No. 71–1041. TAXAY *v.* SHAFFER, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–1090. CABBLER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 212 Va. 520, 184 S. E. 2d 781.

No. 71–1099. PHOENIX NEWSPAPERS, INC., ET AL. *v.* PEAGLER ET AL. Super. Ct. Ariz., County of Maricopa. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–1019. TEXTILE WORKERS UNION OF AMERICA, AFL–CIO *v.* MOORE OF BEDFORD, INC., ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 406.

No. 71–5367. AMPHY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 259 La. 161, 249 So. 2d 560.

No. 71–5657. WILLIAMS *v.* DIRECTOR, PATUXENT INSTITUTION. Ct. Sp. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5714. SCHERER *v.* HOCKER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 443 F. 2d 1176.

No. 71–6011. BREEDLOVE ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 470 S. W. 2d 880.

No. 71–6023. CAMARA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 1122.

No. 71–6029. SILVERSTEIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–979. CITY OF CHICAGO ET AL. *v.* FEDERAL POWER COMMISSION. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 147 U. S. App. D. C. 312, 458 F. 2d 731.

No. 71–6030. TEAGUE *v.* WRIGHT. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–976. TYRONE *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 451 F. 2d 16.

No. 71–1002. LAMM *v.* VOLPE, SECRETARY OF TRANSPORTATION, ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 449 F. 2d 1202.

No. 71–1042. EXER-GENIE, INC., ET AL. *v.* McDONALD ET AL. C. A. 9th Cir. Motion of respondents for leave to dispense with printing brief granted. Certiorari denied. Reported below: 453 F. 2d 132.

No. 71–1052. McKINNEY, DBA PARIS BOOKSTALL, ET AL. *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSSTEWART are of the opinion that certiorari should be granted and judgment reversed. *Redrup* v. *New York*, 386 U. S. 767 (1967). Reported below: 287 Ala. 648, 254 So. 2d 714.

No. 71–1072. HEYMAN, TRUSTEE IN BANKRUPTCY *v.* MAHIN, DIRECTOR OF REVENUE OF ILLINOIS, ET AL. Sup. Ct. Ill. Motion of S. Bloom, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 49 Ill. 2d 284, 275 N. E. 2d 421.

No. 71–1077. ELLIS, TRUSTEE *v.* POWERS ET AL. Sup. Ct. Hawaii. Motion to proceed on typewritten papers granted. Certiorari denied.

No. 71–6104. PATTERSON *v.* LASH, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 452 F. 2d 150.

Rehearing Denied

No. 71–854. DEUTSCH CO., METAL COMPONENTS DIVISION *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 988;

No. 71–869. DEUTSCH CO., ELECTRONIC COMPONENTS DIVISION *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 988;

No. 71–1013. TEITELBAUM *v.* STONE, SECRETARY OF STATE OF FLORIDA, *ante*, p. 986;

No. 71–1030. KIERNAN ET AL. *v.* LINDSAY, MAYOR OF NEW YORK, ET AL., *ante*, p. 1000;

No. 71–1053. JAMIESON *v.* AMERICAN NATIONAL SAFE DEPOSIT CO. ET AL., *ante*, p. 990;

No. 71–5599. WHEELER *v.* WARDEN, LEAVENWORTH PENITENTIARY, *ante*, p. 935;

No. 71–5711. ENLOW *v.* LASH, WARDEN, *ante*, p. 952;

No. 71–5750. BAYS *v.* UNITED STATES, *ante*, p. 957; and

No. 71–5802. MCGAHEY *v.* UNITED STATES, *ante*, p. 977. Petitions for rehearing denied.

No. 70–5223. LIPSCOMB *v.* UNITED STATES, 404 U. S. 840;

No. 71–5579. DIGGS *v.* DUNNE ET AL., *ante*, p. 925; and

No. 71–5749. SASKO *v.* UNITED STATES, *ante*, p. 957. Motions for leave to file petitions for rehearing denied.

No. 71–654. LOVISI *v.* VIRGINIA, *ante*, p. 936. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 71–5762. SHARROW *v.* BROWN, *ante*, p. 968. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

Reporter's Note

The next page is purposely numbered 1201. The numbers between 1076 and 1201 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

GRAVES *v.* BARNES

APPLICATION FOR STAY OF JUDGMENT

No. A–795. Decided February 7, 1972

Application for stay of three-judge District Court's judgment in Texas legislative reapportionment case, effecting elimination of multi-member districts in Dallas and Bexar Counties, is denied, as applicants did not sustain burden of showing that the decision below was erroneous and that implementation of the judgment pending appeal will lead to irreparable harm. Six other Justices, who were consulted informally, believe the application should be denied.

See: 343 F. Supp. 704.

MR. JUSTICE POWELL, Circuit Justice.

This is an application for a stay of the judgment of a three-judge court sitting in the Western District of Texas. The court's decision covers issues raised in four consolidated actions. The principal issues were as follows:

1. In *Graves* v. *Barnes,* plaintiffs challenged the State's reapportionment plan for the senatorial districts in Harris County (Houston) on the ground that they were racially gerrymandered.

2. In *Regester* v. *Bullock,* the State's reapportionment plan for the Texas House of Representatives was challenged on the grounds of population deviations from the one-man, one-vote requirement, and on the impermissibility of use of multi-member districts in the metropolitan communities.

3. In *Mariott* v. *Smith,* the House plan provision calling for a multi-member district for Dallas County was challenged.

4. In *Archer* v. *Smith,* a generally similar attack was leveled against the use of multi-member districting in Bexar County (San Antonio).

The four cases were consolidated and tried by a single three-judge panel. After full pretrial discovery, during

which over 2,000 pages of depositions were taken, the District Court heard testimony at a 3½-day hearing. The extensive *per curiam* opinion, and the concurring and dissenting opinions, which were handed down after some three weeks of deliberation, reflect a careful and exhaustive consideration of the issues in light of the facts as developed. The court's conclusions, in substance, were as follows:

(a) The Senate redistricting plan, as promulgated by the Texas Legislative Redistricting Board, was approved.

(b) The House redistricting plan was held violative of the Equal Protection Clause because of population deviations from equality of representation. But, in an exercise of judicial restraint, the court suspended its decision in this respect for the purpose of affording the Legislature of Texas an opportunity to adopt a new and constitutional plan. Meanwhile, the forthcoming election may be held under the plan found to be deficient.

(c) The multi-member district plans for Dallas and Bexar Counties were found to be unconstitutional under the standard prescribed by this Court in *Fortson* v. *Dorsey*, 379 U. S. 433, 438–439 (1965); *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966); and *Whitcomb* v. *Chavis*, 403 U. S. 124, 143 (1971). The three-judge court found from the evidence that these multi-member district plans would operate to minimize or cancel out the voting strength of racial minority elements of the voting population, and ordered the implementation of a plan calling for single-member districts for Dallas and Bexar Counties. The State offered no plan for single-member districts for these counties, and the court was compelled to draft its own plan. To minimize the disruptive impact of its ruling, the court ordered that the State's requirement that candidates run from the districts of their residence be abated for the forthcoming election. A candidate residing any-

where within the county, therefore, may run for election from any district in the county.

(d) The evidence with respect to nine other metropolitan multi-member districts was found insufficient to warrant treatment similar to that required for Dallas and Bexar Counties.

(e) Finally, the court's order stated that its judgment was final and that no stays would be granted.

In view of the foregoing holdings, the only present necessity to consider a stay relates to the District Court's decision with respect to multi-member districts in Dallas and Bexar Counties. A number of principles have been recognized to govern a Circuit Justice's in-chambers review of stay applications. Stays pending appeal to this Court are granted only in extraordinary circumstances. A lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity. Any party seeking a stay of that judgment bears the burden of showing that the decision below was erroneous and that the implementation of the judgment pending appeal will lead to irreparable harm.

As a threshold consideration, Justices of this Court have consistently required that there be a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See *Mahan* v. *Howell*, 404 U. S. 1201, 1202; *Organized Village of Kake* v. *Egan*, 80 S. Ct. 33, 4 L. Ed. 2d 34 (1959). Of equal importance in cases presented on direct appeal—where we lack the discretionary power to refuse to decide the merits—is the related question whether five Justices are likely to conclude that the case was erroneously decided below. Justices have also weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating

that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim.

In applying these considerations to the present case, I conclude that a stay should not be granted. The case received careful attention by the three-judge court, the members of which were "on the scene" and more familiar with the situation than the Justices of this Court; and the opinions attest to a conscientious application of principles enunciated by this Court. Moreover, the order of the court was narrowly drawn to effectuate its decision with a minimum of interference with the State's legislative processes, and with a minimum of administrative confusion in the short run.

Following a practice utilized by other Justices in passing on applications raising serious constitutional questions (see *Meredith* v. *Fair*, 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962); *McGee* v. *Eyman*, 83 S. Ct. 230, 9 L. Ed. 2d 267 (1963)), I have consulted informally with each of my Brethren who was available* at this time during the recess. Although no other Justice has participated in the drafting of this opinion, I am authorized to say that each of them would vote to deny this application. My denial of a stay at this point, of course, may not be taken either as a statement of my own position on the merits of the difficult questions raised in this case, or as an indication of what may, in fact, ultimately be the view of my colleagues on the Court.

The application is denied.

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*All Justices, save two who were not available, have been consulted.

CHAMBERS *v.* MISSISSIPPI

ON APPLICATION FOR RECONSIDERATION OF ORDER ADMITTING PETITIONER TO BAIL

No. A–785 (71–5908). Decided February 14, 1972

Application of Mississippi Attorney General, contending that petitioner's return to the community will create a dangerous situation, supported by affidavits of local law enforcement officials stating in conclusory terms that petitioner's presence will create a tense and explosive situation in the community, is denied and the order admitting petitioner to bail is reaffirmed, as petitioner is a lifelong resident of the community, owns his home, has his family there, served on the local police force, is a deacon in a local church, has no prior record, and was released on bail for 14 months before trial, apparently without incident.

See: 252 So. 2d 217.

MR. JUSTICE POWELL, Circuit Justice.

On January 31, 1972, counsel for Leon Chambers, petitioner in No. 71–5908, filed with me, as Circuit Justice for the States constituting the Fifth Circuit, an application for bail pending consideration of his petition for writ of certiorari. Petitioner's counsel detailed the reasons making it appropriate for me to exercise my discretion, under 18 U. S. C. § 3144, to admit this petitioner to bail. A copy of his certiorari petition, which raises two nonfrivolous constitutional questions, was also attached to his application. The Attorney General of Mississippi declined to file a response objecting to the application.

On February 1, 1972, after careful review of petitioner's application, I entered an order admitting him to bail. In order to assure that petitioner would not flee or pose a danger to any other person, I imposed a number of conditions on his release. He was required to post bail bond in the sum of $15,000; to live at home with his family in his hometown of Woodville, Mississippi; to find employment; and to report, immediately upon release and periodically thereafter, to the local sheriff.

Ten days later, on February 11, 1972, the Attorney General of Mississippi filed an application for reconsideration of my order admitting petitioner to bail. Although the Rules of this Court do not provide for such an application, I have carefully re-examined all papers submitted including a response from petitioner's counsel.

The Attorney General, in addition to contending that petitioner's case is frivolous, asserts that petitioner's "return to the community will create a dangerous situation to citizens of that community." In support of this latter allegation, he proffers the affidavits of the County Sheriff, the local Police Commissioner, and the Chief of Police of Woodville. In conclusory terms, these documents state that petitioner's presence will create a tense and explosive situation in the community, which might result in bloodshed. No specific facts are stated in support of the opinions expressed. On the contrary, it appears that this petitioner's roots in the community and record of good behavior merit his release pending final determination of his case. Petitioner is a lifelong resident of Woodville; he owns a home, subject to a mortgage; he has a wife and nine children there; he served for a period on the Woodville police force; he is a deacon in the local Baptist Church; and he has no prior criminal record. Before his trial he was released on bail for approximately 14 months, apparently without incident. During his period of incarceration after his conviction it appears that petitioner was a model prisoner.

On this record, I am unable to conclude that petitioner's mere presence in the community poses such a threat to the public "that the only way to protect against it would be to keep [him] in jail." *Sellers* v. *United States*, 89 S. Ct. 36, 38, 21 L. Ed. 2d 64, 67 (1968) (Black, J., in chambers).

The order admitting petitioner to bail is hereby reaffirmed.

It is so ordered.

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BORROWERS. See **Banks; Farm Credit Act; Taxes,** 2–3.

BOSTON STATE HOSPITAL. See **Constitutional Law,** III, 5; **Loyalty Oaths.**

BREACH OF THE PEACE. See **Constitutional Law,** VI, 1.

BUDDHISTS. See **Constitutional Law,** VI, 2; **Procedure,** 7.

BURDEN OF PROOF. See **Constitutional Law,** V, 5; **Juries; Stays.**

BUSINESS BAD DEBTS. See **Taxes,** 1.

CANDIDATES. See **Elections.**

CAPITAL ASSETS. See **Farm Credit Act; Taxes,** 3.

"CARMEN BABY." See **Obscenity.**

CELLER-KEFAUVER ANTI-MERGER ACT. See **Antitrust Acts,** 2.

CERTIFICATION OF ELECTIONS. See **Constitutional Law,** IV.

CERTIORARI. See also **Fair Labor Standards Act; Labor.**

Improvident grant—Collective-bargaining agreement—Not applicable to all disputes.—Grant of certiorari, to decide whether employees may sue for overtime allegedly withheld in violation of Fair Labor Standards Act if complaint of that violation was also subject to grievance and arbitration provisions of collective-bargaining agreement, was improvident in view of subsequent disclosure that those provisions did not apply to all disputes but merely those based on violations of the agreement. Iowa Beef Packers v. Thompson, p. 228.

CHILDREN. See **Constitutional Law,** III, 7; V, 1; **Procedure,** 1.

CIVIL RIGHTS. See **Jurisdiction,** 1.

CLASSIFICATIONS. See **Constitutional Law,** V, 4; **Judicial Review; Selective Service Act.**

CLAYTON ACT. See **Antitrust Acts,** 1, 2.

CODEFENDANTS. See **Constitutional Law,** VII, 1; **Procedure,** 2.

COGNOVIT PROVISIONS. See **Confession of Judgment.**

COLLECTIVE-BARGAINING AGREEMENTS. See **Certiorari; Fair Labor Standards Act; Labor.**

COMITY. See **Habeas Corpus,** 2; **Procedure,** 6.

COMMERCE. See **Airports; Antitrust Acts,** 1, 4; **Constitutional Law,** I.

COMMERCIAL AIRCRAFT. See **Airports; Constitutional Law,** I.

COMMISSIONS. See **Banks; Taxes,** 2.

COMMITMENT FOR TREATMENT. See **Habeas Corpus,** 3; **Procedure,** 5.

COMMUNITY TIES. See **Bail.**

COMPELLING STATE INTERESTS. See **Constitutional Law,** V, 4.

COMPETITION. See **Antitrust Acts,** 2, 4; **Federal Trade Commission; Procedure,** 4.

CONDITIONS ON DIVESTITURE. See **Antitrust Acts,** 3.

CONFESSION OF JUDGMENT. See also **Appeals; Constitutional Law,** III, 1–2.

1. *Consideration for waiver of notice—Cognovit provisions—Due process.*—Petitioner corporation, for consideration and with full awareness of legal consequences, waived its right to pre-judgment notice and hearing, and on facts of case, which involved contractual arrangements between two corporations acting with advice of counsel, the procedure under the cognovit clause (which is not unconstitutional *per se*) did not violate petitioner corporation's Fourteenth Amendment rights. D. H. Overmyer Co. v. Frick Co., p. 174.

2. *Pennsylvania cognovit provisions—Waiver of rights—Constitutionality.*—Pennsylvania rules and statutes relating to cognovit provisions are not unconstitutional on their face, as under appropriate circumstances a cognovit debtor may be held effectively and legally to have waived the rights he would possess if the document he signed had contained no cognovit provisions. Swarb v. Lennox, p. 191.

CONFESSIONS. See **Constitutional Law,** VII, 1; **Procedure,** 2.

CONFRONTATION. See **Constitutional Law,** VII, 1; **Procedure,** 2.

CONNECTICUT. See **Garnishment; Injunctions,** 1; **Jurisdiction,** 1.

CONSCIENTIOUS OBJECTORS. See **Habeas Corpus,** 2; **Selective Service Act.**

CONSERVATIONISTS. See **Administrative Procedure Act; Standing**, 1.

CONSIDERATION FOR WAIVER. See **Confession of Judgment**, 1; **Constitutional Law**, III, 1.

CONSTITUTIONAL INVALIDITY. See **Evidence; Procedure**, 8.

CONSTITUTIONAL LAW. See also **Airports; Confession of Judgment; Contempt; Elections**, 1; **Habeas Corpus; Injunctions**, 2; **Juries; Loyalty Oaths; Mootness; Procedure**, 2, 7; **Standing**, 1; **Vagrancy**, 2.

I. Commerce Clause.

Charge per airline passenger—Burden on commerce.—Charge per passenger on scheduled commercial airliners designed to make users of state-provided facilities pay reasonable charge for their construction and maintenance may constitutionally be imposed on interstate and domestic users alike, and such charges do not discriminate against interstate commerce and travel. Airport Authority v. Delta Airlines, p. 707.

II. Double Jeopardy.

Criminal contempt—Refusal to answer grand jury's questions.—Where court ordered petitioner to answer grand jury's questions, which he had refused to answer despite grant of immunity, and he refused, his sentence for violation of N. Y. Judiciary Law § 750 was a penalty for criminal contempt for purposes of the Double Jeopardy Clause. Colombo v. New York, p. 9.

III. Due Process.

1. *Cognovit provisions—Consideration for waiver of notice.*—Petitioner corporation, for consideration and with full awareness of legal consequences, waived its right to pre-judgment notice and hearing, and on facts of case, which involved contractual arrangements between two corporations acting with advice of counsel, the procedure under the cognovit clause (which is not unconstitutional *per se*) did not violate petitioner corporation's Fourteenth Amendment rights. D. H. Overmyer Co. v. Frick Co., p. 174.

2. *Cognovit provisions—Pennsylvania scheme.*—Pennsylvania rules and statutes relating to cognovit provisions are not unconstitutional on their face, as under appropriate circumstances a cognovit debtor may be held effectively and legally to have waived the rights he would possess if the document he signed had contained no cognovit provisions. Swarb v. Lennox, p. 191.

3. *Jacksonville, Florida, vagrancy ordinance—Vagueness.*—The ordinance is void for vagueness, in that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is

CONSTITUTIONAL LAW—Continued.

forbidden by the statute," it encourages arbitrary and erratic arrests and convictions, it makes criminal activities which by modern standards are normally innocent, and it places almost unfettered discretion in the hands of the police. Papachristou v. City of Jacksonville, p. 156.

4. *Landlord and tenant—Early trial and limitation of litigable issues.*—Neither the early trial provision nor the limitation of litigable issues in Oregon's Forcible Entry and Wrongful Detainer statute is invalid on its face under the Due Process Clause, as time for trial preparation is not unduly short where the issue is simply whether the tenant has paid or has held over, and due process is not denied because rents are not suspended while landlord's alleged wrongdoings are litigated, as Oregon may treat tenant's and landlord's undertakings as independent covenants. Lindsey v. Normet, p. 56.

5. *Massachusetts' loyalty oath—Not void for vagueness.*—Massachusetts' loyalty oath is not void for vagueness. Perjury, the sole punishment, requires knowing and willful falsehood, which removes danger of punishment without fair notice; and there is no problem of punishment inflicted by mere prosecution, as there has been no prosecution under the statute since enactment, nor has any been planned. Cole v. Richardson, p. 676.

6. *Promise of leniency to key witness—Failure to disclose.*—Neither the Assistant United States Attorney's lack of authority to make alleged promise of leniency to key witness, nor his failure to inform his superiors and associates of such promise is controlling, and the prosecution's duty to present all material evidence to jury was not fulfilled and constitutes a violation of due process requiring a new trial. Giglio v. United States, p. 150.

7. *Unwed father's fitness as parent—Hearing.*—Under Due Process Clause petitioner was entitled to a hearing on his fitness as parent before his children were taken from him. State cannot merely presume that unmarried fathers in general and petitioner in particular are unsuitable and neglectful parents. Stanley v. Illinois, p. 645.

IV. Elections.

Election of Senator—Recount by State.—Article I, § 5, does not prohibit a recount of ballots by Indiana in close senatorial election, as recount will not prevent an independent Senate evaluation of the election any more than the original count did, and it would be mere speculation to assume that Indiana's procedure would impair Senate's ability to make an independent final judgment. Roudebush v. Hartke, p. 15.

CONSTITUTIONAL LAW—Continued.

V. Equal Protection.

1. *Distribution of contraceptives—Unmarried persons.*—By providing dissimilar treatment for married and unmarried persons who are similarly situated, the Massachusetts statute limiting distribution of contraceptives violates the Equal Protection Clause of the Fourteenth Amendment. Eisenstadt v. Baird, p. 438.

2. *Landlord and tenants—Double bonds.*—Double-bond prerequisite for appealing an action under Oregon's Forcible Entry and Wrongful Detainer statute violates the Equal Protection Clause as it arbitrarily discriminates against tenants wishing to appeal from adverse decisions. It heavily burdens the statutory right of a defendant to appeal and it is not necessary to effectuate State's purpose of preserving the property in issue. Lindsey v. Normet, p. 56.

3. *Landlord and tenants—Early trial and limitation of litigable issues.*—Neither the early trial provision nor the limitation of litigable issues in Oregon's Forcible Entry and Wrongful Detainer statute is invalid under the Equal Protection Clause as the State has the power to implement its legitimate objective of achieving rapid and peaceful settlement of possessory disputes between landlord and tenant by enacting special provisions applicable only to such disputes. Lindsey v. Normet, p. 56.

4. *Registration to vote—Residence requirements.*—Tennessee's requirements of residence in the State for one year and in the county for three months as prerequisites for registration to vote are violative of the Equal Protection Clause of the Fourteenth Amendment, as they are not necessary to further a compelling state interest. Dunn v. Blumstein, p. 330.

5. *Selection of jurors—Racial discrimination.*—Petitioner made out prima facie case of invidious racial discrimination in selection of grand jury that indicted him—not only on statistical basis but by showing that selection procedures were not racially neutral—and the State did not meet the burden of rebutting the presumption of unconstitutionality in the procedure used. Alexander v. Louisiana, p. 625.

6. *Sex discrimination—Women jurors.*—Petitioner's contentions regarding discrimination against women in the selection of grand jurors are not reached. Alexander v. Louisiana, p. 625.

7. *Texas primary elections—Filing fees.*—Texas primary election filing fee system, which requires payment of fees ranging as high as $8,900, contravenes the Equal Protection Clause of the Fourteenth Amendment. Bullock v. Carter, p. 134.

CONSTITUTIONAL LAW—Continued.

8. *Unwed father's fitness as parent—Hearing.*—Denial to unwed fathers of the hearing on fitness accorded to all other parents whose custody of children is challenged by the State constitutes a denial of equal protection of the laws. Stanley v. Illinois, p. 645.

VI. First Amendment.

1. *Breach of the peace—Vagueness.*—Georgia statute providing that anyone using "opprobrious words or abusive language, tending to cause a breach of the peace" shall be guilty of a misdemeanor, which has not been narrowed by the courts to apply only to "fighting" words "which by their very utterance . . . tend to incite an immediate breach of the peace," *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572, is on its face unconstitutionally vague and overbroad under the First and Fourteenth Amendments. Gooding v. Wilson, p. 518.

2. *Prisoners—Free exercise of religion.*—On basis of allegations, Texas has discriminated against petitioner by denying him reasonable opportunity to pursue his Buddhist faith comparable to that offered other prisoners adhering to conventional religious concepts, and cause is remanded for hearing and appropriate findings. Cruz v. Beto, p. 319.

VII. Sixth Amendment.

1. *Confrontation—Codefendant's confession—Harmless error.*—Any violation of *Bruton* v. *United States,* 391 U. S. 123, that might have occurred by introduction of confession of codefendant, who did not testify, was harmless beyond reasonable doubt in view of overwhelming evidence of petitioner's guilt as manifested by his confession, which completely comported with objective evidence, and comparatively insignificant effect of codefendant's admission. Schneble v. Florida, p. 427.

2. *Counsel at preliminary hearings—Retroactivity.*—Illinois Supreme Court's holding that *Coleman* v. *Alabama,* 399 U. S. 1, in which this Court held that a prelimnary hearing is a critical stage of the criminal process at which the accused is constitutionally entitled to assistance of counsel, is not retroactive, is affirmed. Adams v. Illinois, p. 278.

CONSTITUTIONAL OATHS. See **Constitutional Law,** III, 5; **Loyalty Oaths.**

CONSTRUCTION CORPORATIONS. See **Taxes,** 1.

CONSUMER FINANCING CONTRACTS. See **Appeals; Confession of Judgment,** 2; **Constitutional Law,** III, 2.

CONSUMER PROTECTION. See **Federal Trade Commission; Procedure,** 4.

CONTEMPT. See also **Constitutional Law,** II.

Refusal to answer grand jury's questions—Court order—Double jeopardy.—Where court ordered petitioner to answer grand jury's questions, which he had refused to answer despite grant of immunity, and he refused, his sentence for violation of N. Y. Judiciary Law § 750 was a penalty for criminal contempt for purposes of the Double Jeopardy Clause. Colombo v. New York, p. 9.

CONTEXT OF EXHIBITION. See **Obscenity.**

CONTRACEPTIVES. See **Constitutional Law,** V, 1; **Standing,** 2.

CONTRIBUTING TO DELINQUENCY. See **Habeas Corpus,** 3; **Procedure,** 5.

CONTROLLED CORPORATIONS. See **Banks; Taxes,** 3.

COOPERATIVE ASSOCIATIONS. See **Antitrust Acts,** 4; **Farm Credit Act; Taxes,** 3.

CORPORATIONS. See **Confession of Judgment; Constitutional Law,** III, 1; **Taxes,** 2.

COST OF PRIMARIES. See **Constitutional Law,** V, 7; **Elections,** 2.

COUNSEL. See **Constitutional Law,** VII, 2; **Evidence; Habeas Corpus,** 1.

COUNSEL'S ADVICE. See **Confession of Judgment,** 1; **Constitutional Law,** III, 1.

COURT OF APPEALS. See **Federal Trade Commission; Procedure,** 8.

COURTS. See **Jurisdiction,** 2; **Removal.**

COURTS-MARTIAL. See **Habeas Corpus,** 2; **Procedure,** 6.

CREDIBILITY. See **Evidence; Procedure,** 8.

CREDIT LIFE INSURANCE. See **Banks; Taxes,** 2.

CREDITORS. See **Appeals; Confession of Judgment,** 1–2; **Constitutional Law,** III, 1–2.

CRIMINAL CONTEMPT. See **Constitutional Law,** II; **Contempt.**

CRIMINAL LAW. See **Constitutional Law,** II; III, 3, 5, 6; V, 5; VI, 1–2; VII, 1–2; **Evidence; Habeas Corpus,** 1, 3; **Obscenity; Standing,** 2.

CRIMINAL RECORD. See **Evidence; Procedure,** 8.

CROSS-ACTIONS. See **Jurisdiction**, 2; **Removal.**

CROSS APPEALS. See **Appeals**; **Confession of Judgment**, 2; **Constitutional Law**, III, 2.

CUSTODY OF CHILDREN. See **Constitutional Law**, III, 7; V, 8.

DALLAS COUNTY. See **Stay.**

DAMAGES. See **Antitrust Acts**, 1.

DANGER TO COMMUNITY. See **Bail.**

DEBTORS. See **Appeals**; **Confession of Judgment**, 1–2; **Constitutional Law**, III, 1–2.

DEBTS. See **Taxes**, 1.

DECEPTIVE PRACTICES. See **Federal Trade Commission**; **Procedure**, 4.

DEDUCTIONS. See **Farm Credit Act**; **Taxes**, 3.

DELINQUENCY OF MINOR. See **Habeas Corpus**, 3; **Procedure**, 5.

DEMOCRATIC PRIMARIES. See **Constitutional Law**, V, 7; **Elections**, 2.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. See **Social Security Act.**

DEPENDENTS. See **Constitutional Law**, III, 7; **Procedure**, 1.

DESERTION. See **Procedure**, 1.

DISABILITY PAYMENTS. See **Social Security Act.**

DISCHARGE FROM MILITARY. See **Habeas Corpus**, 2; **Procedure**, 6.

DISCHARGE OF EMPLOYEES. See **National Labor Relations Act.**

DISCRETION. See **Constitutional Law**, VI, 2; **Judicial Review**; **Procedure**, 7; **Selective Service Act**, 1.

DISCRIMINATION. See **Constitutional Law**, I; V, 2, 6; VI, 2; **Elections**, 2; **Juries.**

DISTRIBUTION OF CONTRACEPTIVES. See **Constitutional Law**, V, 1; **Standing**, 2.

DISTRICT COURTS. See **Habeas Corpus**, 1–2; **Procedure**, 1.

DIVERSITY JURISDICTION. See **Jurisdiction**, 2; **Removal.**

DIVESTITURE. See **Antitrust Acts**, 3.

DIVISION OF MARKETS. See **Antitrust Acts**, 4.

DOMINANT MOTIVATION. See **Taxes**, 1.

DOUBLE JEOPARDY. See **Constitutional Law**, II; **Contempt.**

DOUBLE-RENT BONDS. See **Constitutional Law**, III, 4.

DRAFT BOARDS. See **Judicial Review**; **Selective Service Act**, 1.

DRESS MEMORIAL AIRPORT. See **Airports**; **Constitutional Law**, I.

DRIVE-IN THEATERS. See **Obscenity.**

DRUGS. See **Constitutional Law**, VII, 2; **Standing**, 2.

DUE PROCESS. See **Constitutional Law**, III, 1–7; **Habeas Corpus**, 1–3; **Procedure**, 1, 3, 8; **Vagrancy**, 1.

DURATIONAL RESIDENCE REQUIREMENTS. See **Constitutional Law**, V, 4.

DUTY TO PRESENT EVIDENCE. See **Constitutional Law**, III, 6.

EARLY TRIAL PROVISIONS. See **Constitutional Law**, III, 4.

ECOLOGY. See **Administrative Procedure Act**; **Standing**, 1.

ECONOMIC INJURY. See **Administrative Procedure Act**; **Standing**, 1.

ECONOMY OF THE STATES. See **Antitrust Acts**, 1.

ELECTION DISTRICTS. See **Stays.**

ELECTIONS. See also **Constitutional Law**, V, 4, 7; **Injunctions**, 2; **Mootness.**

1. *Senatorial elections—Recounts—Mootness.*—Issue here, whether recount is a valid exercise of State's power to prescribe times, places, and manner of holding elections, pursuant to Art. I, § 4, of the Constitution, or is a forbidden infringement on Senate's power under Art. I, § 5, is not moot, as Senate has postponed making final determination of who is entitled to the seat pending outcome of this action. Roudebush v. Hartke, p. 15.

2. *Texas primary elections—Filing fees.*—Texas primary election filing fee system, which requires payment of fees ranging as high as $8,900, contravenes the Equal Protection Clause of the Fourteenth Amendment. Bullock v. Carter, p. 134.

ELECTRICAL CONTRACTOR. See **National Labor Relations Act.**

ELECTRIC AUTOLITE CO. See **Antitrust Acts**, 2.

EMPLOYER AND EMPLOYEES. See **Certiorari; Fair Labor Standards Act; Labor; National Labor Relations Act; Taxes,** 1.

ENJOINING STATE COURT ACTIONS. See **Garnishment; Injunctions,** 1; **Jurisdiction,** 1.

ENJOINING STATE PROCEEDINGS. See **Constitutional Law,** IV; **Elections,** 1; **Injunctions,** 2; **Mootness.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** V, 1–8; **Habeas Corpus,** 3; **Procedure,** 7; **Stay.**

EVANSVILLE, INDIANA. See **Airports; Constitutional Law,** I.

EVICTION. See **Constitutional Law,** III, 4.

EVIDENCE. See also **Constitutional Law,** III, 6; V, 5; VII, 1; **Procedure,** 1, 8; **Social Security Act.**

Impeaching credibility—Previous convictions—Constitutional invalidity.—Court of Appeals' denial of habeas corpus relief to petitioner, who admitted previous convictions in response to prosecutor's interrogation for purpose of impeaching petitioner's credibility, and who alleges that the previous convictions were constitutionally invalid because he was denied assistance of counsel at previous trials, vacated and remanded for further proceedings. Loper v. Beto, p. 473.

EVIDENTIARY HEARINGS. See **Habeas Corpus,** 1, 3; **Procedure,** 5.

EXEMPTIONS. See **Judicial Review; Selective Service Act,** 2.

EXHAUSTION OF REMEDIES. See **Habeas Corpus,** 2; **Procedure,** 1.

EXHIBITIONS. See **Obscenity.**

FACIAL UNCONSTITUTIONALITY. See **Appeals; Confession of Judgment,** 2; **Constitutional Law,** III, 2, 4.

FAIR LABOR STANDARDS ACT. See also **Certiorari; Labor.**

Overtime pay—Collective-bargaining agreement—Grievance and arbitration provisions.—Grant of certiorari, to decide whether employees may sue for overtime allegedly withheld in violation of Fair Labor Standards Act if complaint of that violation was also subject to grievance and arbitration provisions of collective-bargaining agreement, was improvident in view of subsequent disclosure that those provisions did not apply to all disputes but merely those based on violations of the agreement. Iowa Beef Packers v. Thompson, p. 228.

FAIR NOTICE. See **Constitutional Law,** III, 2; **Obscenity; Vagrancy,** 2.

FARM CREDIT ACT. See also **Taxes**, 3.

Banks for Cooperatives—Required purchase of stock by borrower—Capital asset.—Purchase of Class C stock of Banks for Cooperatives, required of a borrower by the Act, was acquisition of capital asset having a long-term value, and cost was not an amount "contracted to pay for the use of the borrowed money," and thus was not deductible as interest. United States v. Mississippi Chemical Corp., p. 298.

FATHERS. See **Constitutional Law**, V, 8.

FEDERAL QUESTION. See **Procedure**, 1.

FEDERAL-STATE RELATIONS. See **Elections**, 1; **Habeas Corpus**, 1; **Jurisdiction**, 1; **Removal.**

FEDERAL TRADE COMMISSION. See also **Procedure**, 4.

Protection of consumers—Unfair methods of competition—Deceptive practices.—The FTC has power to protect consumers as well as competitors and is authorized to determine whether challenged practices, though posing no threat to competition within the letter or spirit of the antitrust laws, are nevertheless either unfair methods of competition, or unfair or deceptive acts or practices. FTC v. Sperry & Hutchinson Co., p. 233.

FEES. See **Airports**; **Constitutional Law**, I; V, 7; **Elections**, 2.

FIFTH AMENDMENT. See **Constitutional Law**, III, 6; **Contempt.**

FIGHTING WORDS. See **Constitutional Law**, VI, 1.

FILING FEES. See **Constitutional Law**, V, 7; **Elections**, 2.

FILMS. See **Obscenity.**

FINANCING PRIMARIES. See **Constitutional Law**, V, 7; **Elections**, 2.

FIRST AMENDMENT. See **Constitutional Law**, III, 5; VI, 1–2; **Procedure**, 7.

FITNESS OF PARENTS. See **Constitutional Law**, III, 7.

FLORIDA. See **Constitutional Law**, III, 3; VII, 1; **Procedure**, 2; **Vagrancy**, 1–2.

FORCIBLE ENTRY AND WRONGFUL DETAINER STATUTE. See **Constitutional Law**, V, 2.

FORD MOTOR CO. See **Antitrust Acts**, 2.

FOURTEENTH AMENDMENT. See **Confession of Judgment**, 1, 2; **Constitutional Law**, III, 3–5, 7; V, 4–5, 7; VI, 1–2; **Contempt**; **Habeas Corpus**, 3; **Procedure**, 1–2; **Standing**, 2; **Stay.**

FREEDOM OF SPEECH. See **Constitutional Law**, VI, 1.

FREE EXERCISE OF RELIGION. See **Constitutional Law**, VI, 2; **Procedure**, 7.

GARNISHMENT. See also **Injunctions**, 1; **Jurisdiction**, 1.

Prejudgment garnishment—Participation of state courts—Injunctions.—Prejudgment garnishment under Connecticut statutes is levied and maintained without participation of state courts and thus an injunction against such action is not barred by provisions of 28 U. S. C. § 2283. Lynch v. Household Finance Corp., p. 538.

GEORGIA. See **Constitutional Law**, VI, 1.

GRAND JURIES. See **Constitutional Law**, V, 5; **Contempt.**

GRANT OF IMMUNITY. See **Constitutional Law**, II; **Contempt.**

GREEN STAMPS. See **Federal Trade Commission**; **Procedure**, 4.

GRIEVANCES. See **Certiorari**; **Fair Labor Standards Act**; **Labor.**

GROCERY PRODUCTS. See **Antitrust Acts**, 4.

GUARDIANSHIP. See **Constitutional Law**, III, 7.

GUILTY PLEAS. See **Habeas Corpus**, 1.

HABEAS CORPUS. See also **Evidence**; **Procedure**, 5–6, 8.

1. *Evidentiary hearings—Waiver of counsel—State post-conviction hearings.*—Where material facts bearing on issue of whether petitioner knowingly and voluntarily waived his constitutional right to counsel before entering guilty plea in state trial court were inadequately developed in state post-conviction hearing, Federal District Court considering habeas corpus petition was under a duty to hold an evidentiary hearing. Boyd v. Dutton, p. 1.

2. *Serviceman — Conscientious objector — Court-martial proceedings.*—District Court should not have stayed its hand in habeas corpus petition by member of armed forces who had exhausted all his administrative remedies in attempting to secure discharge as conscientious objector, until completion of court-martial proceedings, as military justice system in processing of court-martial charge could not provide the discharge sought by petitioner with promptness and certainty. Parisi v. Davidson, p. 34.

HABEAS CORPUS—Continued.

3. *Wisconsin Sex Crimes Act—Commitment for treatment—Waiver of claims.*—Federal habeas corpus is not barred by every state procedural default, and an evidentiary hearing is required to determine whether petitioner knowingly and intelligently made deliberate strategic waiver of his claims in state court. Humphrey v. Cady, p. 504.

HARMFUL ARTICLES. See **Constitutional Law**, V, 1; **Standing**, 2.

HARMLESS ERROR. See **Constitutional Law**, VII, 1; **Procedure**, 2.

HAWAII. See **Antitrust Acts**, 1.

HEALTH. See **Constitutional Law**, V, 1; **Standing**, 2.

HEALTH, EDUCATION, AND WELFARE. See **Social Security Act.**

HEARINGS. See **Constitutional Law**, III, 2, 5, 7; VI, 2; **Habeas Corpus**, 1, 3; **Procedure**, 3, 7.

HEROIN. See **Constitutional Law**, VII, 2; **Procedure**, 3.

HOLDING COMPANIES. See **Banks**; **Taxes**, 2.

HORIZONTAL RESTRAINTS. See **Antitrust Acts**, 4.

HOURS OF WORK. See **Certiorari**; **Fair Labor Standards Act**; **Labor.**

HOUSING. See **Constitutional Law**, III, 4; V, 3–4.

ILLEGITIMATE CHILDREN. See **Constitutional Law**, III, 7; V, 8.

ILLINOIS. See **Constitutional Law**, III, 7; VII, 2; **Procedure**, 3.

IMMUNITY. See **Constitutional Law**, II; **Contempt.**

IMPEACHING CREDIBILITY. See **Evidence**; **Procedure**, 8.

INCOME TAXES. See **Banks**; **Taxes**, 2.

INDEMNITY AGREEMENTS. See **Taxes**, 1.

INDIANA. See **Airports**; **Elections**, 1; **Procedure**, 1.

INDUCTION ORDERS. See **Judicial Review**; **Selective Service Act**, 1.

INFORMING SUPERIORS. See **Constitutional Law**, III, 6.

INJUNCTIONS. See also **Constitutional Law,** IV; **Elections,** 1; **Garnishment; Jurisdiction,** 1; **Mootness; Standing,** 1.

1. *Prejudgment garnishment—Participation of state courts.*—Prejudgment garnishment under Connecticut statutes is levied and maintained without participation of state courts, and thus an injunction against such action is not barred by provisions of 28 U. S. C. § 2283. Lynch v. Household Finance Corp., p. 538.

2. *State court proceedings—Nonjudicial functions—Recount commissioners.*—District Court was not barred from issuing an injunction by 28 U. S. C. § 2283, which generally prohibits a federal court from enjoining state court proceedings, as Indiana court's functions of determining that recount petition is correct as to form and appointing recount commissioners are nonjudicial, and § 2283 does not restrict enjoining state court's acting in nonjudicial capacity. Roudebush v. Hartke, p. 15.

INJURY. See **Administrative Procedure Act; Standing,** 1.

INJURY TO ECONOMY. See **Antitrust Acts,** 1.

INSURANCE PREMIUMS. See **Banks; Taxes,** 2.

INTEREST DEDUCTIONS. See **Farm Credit Act; Taxes,** 3.

INTERNAL REVENUE. See **Banks; Taxes,** 2, 3.

INTERNAL REVENUE CODE. See **Farm Credit Act; Taxes,** 3.

INTERPLEADERS. See **Jurisdiction,** 2; **Removal.**

INTERSTATE COMMERCE. See **Airports; Constitutional Law,** I.

INTERSTATE TRAVEL. See **Constitutional Law,** I; V, 4.

INTERVENING REGULATIONS. See **Social Security Act.**

INTERVENING STATUTE. See **Judicial Review; Selective Service Act,** 1.

INVALID CONVICTIONS. See **Evidence; Procedure,** 8.

INVESTIGATIONS. See **National Labor Relations Act.**

IOWA. See **Fair Labor Standards Act.**

IRREPARABLE HARM. See **Stay.**

JACKSONVILLE. See **Constitutional Law,** III, 3; **Vagrancy,** 2.

JUDGES. See **Constitutional Law,** II; **Contempt.**

JUDGMENTS. See **Constitutional Law,** III, 1–2; **Confession of Judgment,** 1–2; **Federal Trade Commission; Procedure,** 1, 4.

JUDICIAL CONSTRUCTION. See **Constitutional Law,** VI, 1.

JUDICIAL REVIEW. See also **Administrative Procedure Act; Selective Service Act,** 1; **Standing,** 1.

Selective Service appeals—Pre-induction judicial review.—Section 10 (b) (3) of the Military Selective Service Act of 1967 forecloses pre-induction judicial review where the board has used its discretion and judgment in determining facts and arriving at classification for registrant. In such case registrant's judicial review is confined to situations where he asserts defense to criminal prosecution or where, after induction, he seeks writ of habeas corpus. Fein v. Selective Service System, p. 365.

JURIES. See also **Constitutional Law,** II; V, 5; **Procedure,** 5; **Taxes,** 1.

Equal protection of the laws—Racial discrimination—Presumption.—Petitioner made out prima facie case of invidious racial discrimination in selection of grand jury that indicted him—not only on statistical basis but by showing that selection procedures were not racially neutral—and the State did not meet the burden of rebutting the presumption of unconstitutionality in the procedure used. Alexander v. Louisiana, p. 625.

JURISDICTION. See also **Garnishment; Injunctions,** 2; **Procedure,** 1; **National Labor Relations Act; Removal.**

1. *Personal liberties—Property rights—28 U. S. C. § 1343 (3).*—There is no distinction between personal liberties and proprietary rights with respect to jurisdiction under 28 U. S. C. § 1343 (3). It would be virtually impossible to apply a "personal liberties" limitation on that section as there is no real dichotomy between personal liberties and property rights. It has long been recognized that rights in property are basic civil rights. Lynch v. Household Finance Corp., p. 538.

2. *Removal to federal court—Trial of issues—Diversity.*—Where after removal case is tried on merits without objection and federal court enters judgment, issue on appeal is not whether case was properly removed, but whether District Court would have had original jurisdiction if case had been filed in that court. Here there was diversity jurisdiction in District Court if action had been brought there originally. Grubbs v. General Electric Credit Corp., p. 699.

JURY SELECTION. See **Constitutional Law,** V, 5; **Juries.**

JURY TRIALS. See **Habeas Corpus,** 3; **Procedure,** 5.

KNOWLEDGEABLE VOTERS. See **Constitutional Law,** V, 4.

LABOR. See also **Certiorari; Fair Labor Standards Act; National Labor Relations Act.**

Collective-bargaining agreement — Overtime pay — Fair Labor Standards Act.—Grant of certiorari, to decide whether employees may sue for overtime allegedly withheld in violation of Fair Labor Standards Act if complaint of that violation was also subject to grievance and arbitration provisions of collective-bargaining agreement, was improvident in view of subsequent disclosure that those provisions did not apply to all disputes but merely those based on violations of the agreement. Iowa Beef Packers v. Thompson, p. 228.

LACK OF AUTHORITY. See **Constitutional Law,** III, 6.

LANDLORD AND TENANTS. See **Constitutional Law,** III, 4.

LAW ENFORCEMENT OFFICIALS. See **Bail.**

LEASES. See **Appeals; Confession of Judgment,** 2; **Constitutional Law,** III, 2.

LEGISLATIVE AIMS. See **Constitutional Law,** V, 1; **Standing,** 2.

LEGISLATIVE REAPPORTIONMENT. See **Stays.**

LENGTH OF RESIDENCE. See **Constitutional Law,** V, 4.

LENIENCY. See **Constitutional Law,** III, 6.

LICENSES. See **Antitrust Acts,** 4.

LIMITATION OF ISSUES. See **Constitutional Law,** III, 4.

LITIGABLE ISSUES. See **Constitutional Law,** III, 4.

LOAN INSURANCE. See **Banks; Taxes,** 2.

LOCATION OF EXHIBITIONS. See **Obscenity.**

LOSSES. See **Taxes,** 1.

LOUISIANA. See **Constitutional Law,** V, 5–6; **Juries.**

LOYALTY OATHS. See also **Constitutional Law,** III, 5.

Massachusetts' oath for public employees—Constitutionality.—District Court properly held that the "uphold and defend" clause, a paraphrase of the constitutional oath, is permissible. The "oppose the overthrow" clause was not designed to require specific action to be taken in some hypothetical or actual situation but was to assure that those in positions of public trust were willing to commit themselves to live by constitutional processes of our government. Cole v. Richardson, p. 676.

LUNCH PERIODS. See **Certiorari; Fair Labor Standards Act; Labor.**

MARKET DIVISIONS. See **Antitrust Acts,** 4.

MARRIED PERSONS. See **Constitutional Law,** III, 7; **Standing,** 2.

MASSACHUSETTS. See **Constitutional Law,** III, 5; V, 1; **Loyalty Oaths; Standing,** 2.

MEMBERSHIP CORPORATIONS. See **Administrative Procedure Act; Standing,** 1.

MERGERS. See **Antitrust Acts,** 2.

MILITARY JUDICIAL SYSTEM. See **Habeas Corpus,** 2; **Procedure,** 6.

MILITARY SELECTIVE SERVICE ACT of 1967. See **Judicial Review; Selective Service Act,** 1.

MINERAL KING VALLEY. See **Administrative Procedure Act; Standing,** 1.

MISSISSIPPI. See **Bail.**

MODIFICATION OF JUDGMENT. See **Federal Trade Commission; Procedure,** 4.

MONOPOLIZATION. See **Antitrust Acts,** 1.

MOOTNESS. See also **Constitutional Law,** IV; **Habeas Corpus,** 3.

Senatorial elections—Recounts—Seating of Senator.—Issue here, whether recount is a valid exercise of State's power to prescribe times, places, and manner of holding elections, pursuant to Art. I, § 4, of the Constitution, or is a forbidden infringement on Senate's power under Art. I, § 5, is not moot, as Senate has postponed making final determination of who is entitled to the seat pending outcome of this action. Roudebush v. Hartke, p. 15.

MORALS. See **Constitutional Law,** III, 7; **Standing,** 2.

MOTION PICTURES. See **Obscenity.**

MOTION TO DISMISS. See **Procedure,** 1.

MOTIVATION. See **Taxes,** 1.

MULTI-MEMBER DISTRICTS. See **Stay.**

MURDER. See **Constitutional Law,** VII, 1; **Procedure,** 2.

NARCOTICS. See **Constitutional Law,** VII, 2; **Procedure,** 7.

NATIONAL BANK ACT. See **Banks; Taxes,** 2.

NATIONAL FORESTS. See **Administrative Procedure Act; Standing,** 1.

NATIONAL GAME REFUGE. See **Administrative Procedure Act; Standing,** 1.

NATIONAL LABOR RELATIONS ACT.

Investigation of unfair labor practice charge—Statements of employees—Retaliatory discharges.—Employer's discharge of employees because they gave written sworn statements to NLRB field examiner investigating an unfair labor practice charge filed against employer, but who had neither filed the charge nor testified at formal hearing on the charge, constituted a violation of § 8 (a) (4) of the Act. NLRB v. Scrivener, p. 117.

NATURAL RESOURCES. See **Administrative Procedure Act; Standing,** 1.

NEGROES. See **Constitutional Law,** V, 5–6; **Juries.**

NEW HAMPSHIRE. See **Airports; Constitutional Law,** I.

NEW YORK. See **Constitutional Law,** II; **Contempt.**

NONBUSINESS BAD DEBTS. See **Taxes,** 1.

NONJUDICIAL ACTIVITIES. See **Constitutional Law,** IV; **Elections,** 1; **Injunctions,** 2; **Mootness.**

NOTICE. See **Constitutional Law,** III, 3; VII, 1; **Obscenity; Social Security Act; Vagrancy,** 1–2.

NOTICE AND HEARING. See **Confession of Judgment.**

OATHS. See **Constitutional Law,** VI, 1; **Loyalty Oaths.**

OBSCENITY.

Motion pictures—Drive-in theater—Location of exhibition.—State may not criminally punish the exhibition of motion picture film at drive-in theater where the statute assertedly violated has not given fair notice that the location of the exhibition was a vital part of the offense. Rabe v. Washington, p. 313.

OHIO. See **Confession of Judgment,** 1; **Constitutional Law,** III, 1.

OIL INDUSTRY. See **Antitrust Acts,** 1.

OLIGOPOLY. See **Antitrust Acts,** 2.

ON CALL. See **Certiorari; Fair Labor Standards Act; Labor.**

OPPOSE OVERTHROW OF GOVERNMENT. See **Constitutional Law,** III, 5; **Loyalty Oaths.**

OPPROBRIOUS WORDS. See **Constitutional Law**, VI, 1.

ORAL PRESENTATIONS. See **Social Security Act.**

ORDINANCES. See **Constitutional Law**, III, 3; VII, 1; **Vagrancy**, 1–2.

OREGON. See **Constitutional Law**, III, 4.

OVERBREADTH. See **Constitutional Law**, III, 5; VI, 1; **Loyalty Oaths.**

OVERCHARGES. See **Antitrust Acts**, 1.

OVERTHROW OF GOVERNMENT. See **Constitutional Law**, III, 5; **Loyalty Oaths.**

OVERTIME PAY. See **Certiorari**; **Fair Labor Standards Act**; **Labor.**

PARENS PATRIAE. See **Antitrust Acts**, 1.

PARENTAL FITNESS. See **Constitutional Law**, III, 7.

PARTIES. See **Jurisdiction**, 2; **Removal.**

PASSENGERS. See **Airports**; **Constitutional Law**, I.

PAYMENT OF RENT. See **Constitutional Law**, III, 4.

PENNSYLVANIA. See **Appeals**; **Confession of Judgment**, 2; **Constitutional Law**, III, 2.

PERJURY. See **Constitutional Law**, III, 5; **Loyalty Oaths.**

PER SE VIOLATIONS. See **Antitrust Acts**, 4.

PERSON AGGRIEVED. See **Administrative Procedure Act**; **Standing**, 1.

PERSONAL RIGHTS. See **Garnishment**; **Injunctions**, 1; **Jurisdiction**, 1.

PETROLEUM PRODUCTS. See **Antitrust Acts**, 1.

PHILADELPHIA. See **Appeals**; **Confession of Judgment**, 2; **Constitutional Law**, III, 2.

PLEADINGS. See **Procedure**, 1.

PLEAS. See **Habeas Corpus**, 1.

POLITICAL PARTY COMMITTEES. See **Constitutional Law**, V, 7; **Elections**, 2.

PORTLAND, OREGON. See **Constitutional Law**, III, 4; V, 2–3.

POSSESSORY DISPUTES. See **Constitutional Law**, III, 4; V, 2–3.

POST-CONVICTION HEARINGS. See **Habeas Corpus**, 1.

PRACTICE OF RELIGION. See **Constitutional Law**, VI, 2; **Procedure**, 7.

PRE-INDUCTION SUITS. See **Judicial Review**; **Selective Service Act**, 1.

PRE-JUDICIAL GARNISHMENT. See **Garnishment**; **Injunctions**, 1; **Jurisdiction**, 1.

PRELIMINARY HEARINGS. See **Constitutional Law**, VII, 2; **Procedure**, 3.

PREMIUM INCOME. See **Banks**; **Taxes**, 2.

PRESUMPTIONS. See **Constitutional Law**, III, 7; V, 4–5; **Juries.**

PREVIOUS CONVICTIONS. See **Evidence**; **Procedure**, 8.

PRIMA FACIE CASE. See **Constitutional Law**, V, 5–6; **Juries.**

PRIMARY ELECTIONS. See **Constitutional Law**, V, 7; **Elections**, 2.

PRISONERS. See **Constitutional Law**, II; III, 3, 6; V, 5; VI, 1; **Habeas Corpus**, 1, 3; **Procedure**, 2–3, 6–8.

PRIVATE-LABEL BRANDS. See **Antitrust Acts**, 4.

PROCEDURE. See also **Certiorari**; **Confession of Judgment**, 1–2; **Constitutional Law**, III, 4, 6–7; **Contempt**; **Elections**, 1; **Habeas Corpus**, 1; **Juries**; **Removal**; **Selective Service Act**, 1; **Social Security Act**; **Standing**; **Stay.**

1. *Challenge to welfare regulations—Jurisdiction—Exhaustion of remedies.*—Dismissal by District Court of appellants' challenge to Indiana welfare regulations for failure to exhaust administrative remedies, and alternatively for lack of jurisdiction and failure of pleadings to present substantial federal question, was erroneous. Court plainly had jurisdiction and exhaustion is not required in circumstances of this case. If court's characterization of federal question as insubstantial was based on face of complaint, it was error; if it treated motion to dismiss as one for summary judgment its order is unilluminating as to facts or law and was improperly entered. Carter v. Stanton, p. 669.

2. *Confession of codefendant—Confrontation—Harmless error.*—Any violation of *Bruton* v. *United States*, 391 U. S. 123, that might have occurred by introduction of confession of codefendant, who did not testify, was harmless beyond reasonable doubt in view of overwhelming evidence of petitioner's guilt as manifested by his confession, which completely comported with objective evidence, and comparatively insignificant effect of codefendant's admission. Schneble v. Florida, p. 427.

PROCEDURE—Continued.

3. *Counsel at preliminary hearings—Retroactivity.*—Illinois Supreme Court's holding that *Coleman* v. *Alabama*, 399 U. S. 1, in which this Court held that a preliminary hearing is a critical stage of the criminal process at which the accused is constitutionally entitled to assistance of counsel, is not retroactive, is affirmed. Adams v. Illinois, p. 278.

4. *Court of Appeals—Modification of judgment.*—Judgment of Court of Appeals setting aside FTC's order is affirmed, but because the court erred in its construction of § 5 of the Federal Trade Commission Act, its judgment is modified to extent that case is remanded with instructions to return it to the FTC for further proceedings. FTC v. Sperry & Hutchinson Co., p. 233.

5. *Evidentiary hearing—Wisconsin Sex Crimes Act—Jury determination.*—Petitioner's claims concerning his commitment under the Sex Crimes Act are substantial enough to warrant an evidentiary hearing. That Act and the Mental Health Act are apparently not mutually exclusive, and an equal protection claim would be persuasive if it develops on remand that petitioner was deprived of jury determination or other procedural protections merely by arbitrary decision to seek commitment under one Act rather than the other. Humphrey v. Cady, p. 504.

6. *Habeas corpus—Conscientious objector—Court-martial.*—District Court should not have stayed its hand in habeas corpus petition by member of armed forces, who had exhausted all his administrative remedies in attempting to secure discharge as conscientious objector, until completion of court-martial proceedings, as military judicial system in processing of court-martial charge could not provide the discharge sought by petitioner with promptness and certainty. Parisi v. Davidson, p. 34.

7. *Hearings—Prisoners—Free exercise of religion.*—On basis of allegations, Texas has discriminated against petitioner by denying him reasonable opportunity to pursue his Buddhist faith comparable to that offered other prisoners adhering to conventional religious concepts, and cause is remanded for hearing and appropriate findings. Cruz v. Beto, p. 319.

8. *Previous convictions—Impeaching credibility—Constitutional invalidity.*—Court of Appeals' denial of habeas corpus relief to petitoner, who admitted previous convictions in response to prosecutor's interrogation for purpose of impeaching petitioner's credibility, and who alleges that the previous convictions were constitutionally invalid because he was denied assistance of counsel at previous trials, vacated and remanded for further proceedings. Loper v. Beto, p. 473.

PROMISE OF LENIENCY. See **Constitutional Law**, III, 6.

PROMISSORY NOTES. See **Garnishment**; **Injunctions**, 1; **Jurisdiction**, 1.

PROPERTY RIGHTS. See **Garnishment**; **Injunctions**, 1; **Jurisdiction**, 1.

PROSECUTION. See **Constitutional Law**, III, 6.

PROSECUTOR'S OFFICE. See **Constitutional Law**, III, 6.

PROSPECTIVITY. See **Constitutional Law**, VII, 2; **Procedure**, 3.

PROTECTION OF CONSUMERS. See **Federal Trade Commission**; **Procedure**, 4.

PROXIMATE RELATIONSHIP. See **Taxes**, 1.

PUBLIC AIRPORT FACILITIES. See **Airports**; **Constitutional Law**, I.

PUBLIC EMPLOYEES. See **Constitutional Law**, III, 5; **Loyalty Oaths.**

PUNISHMENT. See **Constitutional Law**, II; III, 5; **Loyalty Oaths.**

PURITY OF BALLOT BOX. See **Constitutional Law**, V, 4.

QUALIFICATIONS OF SENATORS. See **Constitutional Law**, IV; **Elections**, 1; **Injunctions**, 2; **Mootness.**

QUESTIONNAIRES. See **Constitutional Law**, V, 5–6; **Juries.**

RACIAL DISCRIMINATION. See **Constitutional Law**, V, 5–6; **Juries.**

RAPE. See **Constitutional Law**, V, 5–6; **Juries.**

REAPPORTIONMENT. See **Stays.**

REBUTTAL EVIDENCE. See **Social Security Act.**

RECONSIDERATION OF BAIL. See **Bail.**

RECOUNTS. See **Constitutional Law**, IV; **Elections**, 1; **Injunctions**, 1; **Mootness.**

RECREATIONAL DEVELOPMENT. See **Administrative Procedure Act**; **Standing**, 1.

REDEMPTION OF TRADING STAMPS. See **Federal Trade Commission**; **Procedure**, 4.

REFUSAL TO ANSWER. See **Constitutional Law**, II; **Contempt.**

REGIONAL SUPERMARKET CHAINS. See **Antitrust Acts**, 4.

REGISTRATION. See **Constitutional Law**, V, 4.

REGULATIONS. See **Judicial Review; Selective Service Act,** 1; **Social Security Act.**

REINSURANCE PREMIUMS. See **Banks; Taxes,** 2.

RELEASE ON BAIL. See **Bail.**

RELIEF. See **Antitrust Acts,** 2; **Habeas Corpus,** 2; **Procedure,** 6, 8.

RELIGIOUS MATERIALS. See **Constitutional Law,** VI, 2; **Procedure,** 7.

REMEDIES. See **Habeas Corpus,** 2; **Procedure,** 1, 6.

REMOVAL. See also **Jurisdiction,** 2.

Trial on merits—Jurisdiction.—Where after removal case is tried on merits without objection and federal court enters judgment, issue on appeal is not whether case was properly removed, but whether District Court would have had original jurisdiction if case had been filed in that court. Here there was diversity jurisdiction in District Court if action had been brought there originally. Grubbs v. General Electric Credit Corp., p. 699.

RENT. See **Constitutional Law,** III, 4; V, 2–3.

REPLACEMENT PARTS. See **Antitrust Acts,** 3.

RESELLING AT WHOLESALE. See **Antitrust Acts,** 4.

RESIDENCE. See **Constitutional Law,** V, 4.

RESTRAINT OF TRADE. See **Antitrust Acts,** 4.

RETALIATORY DISCHARGES. See **National Labor Relations Act.**

RETROACTIVITY. See **Constitutional Law,** VII, 2; **Procedure,** 3.

REVIEW. See **Judicial Review; Selective Service Act,** 1–2.

RIGHT TO COUNSEL. See **Constitutional Law,** VII, 2; **Evidence; Habeas Corpus,** 1; **Procedure,** 3.

RIGHT TO TRAVEL. See **Constitutional Law,** V, 4.

RULE OF REASON. See **Antitrust Acts,** 4.

SALES COMMISSIONS. See **Banks; Taxes,** 2.

SCHEDULED AIRLINERS. See **Airports; Constitutional Law,** I.

SECURITY RENT DEPOSIT. See **Constitutional Law,** III, 4; V, 2–3.

SELECTION OF JURORS. See **Constitutional Law,** V, 5–6; **Juries.**

SELECTIVE SERVICE ACT. See also **Judicial Review.**

1. *Appeal procedures—Pre-induction judicial review.*—Section 10 (b)(3) of the Military Selective Service Act of 1967 forecloses pre-induction judicial review where the board has used its discretion and judgment in determining facts and arriving at classification for registrant. In such case registrant's judicial review is confined to situations where he asserts defense to criminal prosecution or where, after induction, he seeks writ of habeas corpus. Fein v. Selective Service System, p. 365.

2. *Intervening statutory change—Induction.*—Petitioner's immediate induction is not assured, despite foreclosure of pre-induction judicial review, in light of intervening statutory change, the new regulations thereunder, and a change in the Government's position, albeit in post-induction case, to concede that some statement of reasons is necessary for "meaningful" review of administrative decision when registrant's claim has met statutory criteria or has placed him prima facie within statutory exemption. Fein v. Selective Service System, p. 365.

SELECTIVE SERVICE APPEALS. See **Judicial Review; Selective Service Act,** 1–2.

SELF-INCRIMINATION. See **Constitutional Law,** II; III, 6; **Contempt.**

SENATORIAL ELECTIONS. See **Constitutional Law,** IV; **Elections,** 1; **Injunctions,** 1; **Mootness.**

SEQUOIA NATIONAL FOREST. See **Administrative Procedure Act; Standing,** 1.

SERVICE CHARGES. See **Airports; Constitutional Law,** I.

SERVICEMEN. See **Judicial Review; Habeas Corpus,** 2; **Procedure,** 6.

SEX DEVIATE FACILITY. See **Habeas Corpus,** 3; **Procedure,** 5.

SEX DISCRIMINATION. See **Constitutional Law,** V, 5–6; **Juries.**

SEXUAL FRANKNESS. See **Obscenity.**

SHARES OF STOCK. See **Farm Credit Act; Taxes,** 3.

SHERMAN ACT. See **Antitrust Acts,** 1, 4.

S&H GREEN STAMPS. See **Federal Trade Commission; Procedure,** 4.

SIGNIFICANT MOTIVATION. See **Taxes,** 1.

SINGLE-MEMBER DISTRICTS. See **Stay.**

SIXTH AMENDMENT. See **Constitutional Law,** VII, 1–2; **Procedure,** 2–3.

SKIING DEVELOPMENT. See **Administrative Procedure Act; Standing,** 1.

SOCIAL SECURITY ACT. See also **Procedure,** 1.

Disability benefits—Suspension of payments—Notice.—In light of adoption of new regulations providing that recipient of disability benefits pursuant to § 225 of the Act be given notice of proposed suspension of payments and the reasons therefor, plus an opportunity to submit rebuttal evidence, judgment is vacated to permit reprocessing under the new regulations. Richardson v. Wright, p. 208.

SPARK PLUGS. See **Antitrust Acts,** 3.

SPECIAL INTEREST GROUPS. See **Administrative Procedure Act; Standing,** 1.

STAMP EXCHANGES. See **Federal Trade Commission; Procedure,** 4.

STANDING. See also **Administrative Procedure Act; Constitutional Law,** V, 1.

1. *Administrative Procedure Act—Judicial review—Membership corporation.*—Person has standing to seek judicial review under the Act only if he can show that he himself has suffered or will suffer injury, whether economic or otherwise. Here, where petitioner asserted no individualized harm to itself or its members, it lacked standing to maintain the action. Sierra Club v. Morton, p. 727.

2. *Distribution of contraceptives—Unmarried persons—Health measure.*—If Massachusetts statute under which appellee was convicted is not a health measure, appellee may not be prevented, because he was not an authorized distributor, from attacking statute in its alleged discriminatory application to potential distributees. Appellee, furthermore, has standing to assert rights of unmarried persons denied access to contraceptives because their ability to obtain them will be materially impaired by enforcement of the statute. Eisenstadt v. Baird, p. 438.

STATE COURTS. See **Contempt; Injunctions,** 1–2.

STATE EMPLOYEES. See **Constitutional Law,** III, 5; **Loyalty Oaths.**

STATEMENTS. See **National Labor Relations Act.**

STATISTICS. See **Constitutional Law,** V, 5–6; **Juries.**

STATUS QUO ANTE. See **Antitrust Acts,** 2.

STATUTES. See **Constitutional Law**, III, 2, 4–5; VI, 1; **Obscenity**; **Standing**, 2.

STATUTORY CHANGE. See **Judicial Review**; **Selective Service Act**, 1–2.

STAYS.

Texas legislative reapportionment—Multi-member districts—Irreparable harm.—Application for stay of three-judge court's judgment in Texas legislative reapportionment case, effecting elimination of multi-member districts in Dallas and Bexar counties, is denied, as applicants did not sustain burden of showing that decision was erroneous and that implementation of judgment pending appeal will lead to irreparable harm. Graves v. Barnes (POWELL, J., in chambers), p. 1201.

STOCK. See **Farm Credit Act**; **Taxes**, 3.

STOCKHOLDER-LICENSEES. See **Antitrust Acts**, 4.

STOCKHOLDERS. See **Taxes**, 1.

STROLLING AROUND. See **Vagrancy**, 1.

SUBSTANDARD HOUSING. See **Constitutional Law**, III, 4.

SUBSTANTIAL FEDERAL QUESTION. See **Procedure**, 1.

SUMMARY GARNISHMENT. See **Garnishment**; **Injunctions**, 1; **Jurisdiction**, 1.

SUMMARY JUDGMENT. See **Procedure**, 1.

SUPERMARKETS. See **Antitrust Acts**, 4.

SUPREME COURT.

1. Assignment of Mr. Justice Clark (retired) to United States Court of Appeals for the Seventh Circuit, p. 1049.

2. Assignment of Mr. Justice Clark (retired) to United States Court of Customs and Patent Appeals, p. 999.

3. Assignment of Mr. Justice Clark (retired) to United States District Court for the Southern District of Texas, p. 1034.

4. Appointment of Clerk, p. 970.

SUSPENSION OF PAYMENTS. See **Social Security Act.**

TAXES. See also **Banks**; **Farm Credit Act.**

1. *Business bad debts—Indemnification of bonding company—Stockholder and employee.*—In determining whether a bad debt has a "proximate" relation to taxpayer's trade or business and thus qualifies as a business bad debt, the proper standard is that of dominant motivation rather than significant motivation. There is nothing in this record that would support jury verdict in taxpayer's

TAXES—Continued.

favor had the dominant motivation standard been embodied in the instructions. United States v. Generes, p. 93.

2. *Income taxes—Controlled corporations—Reinsurance premium income.*—Since the national banks did not receive and were prohibited by law from receiving sales commissions, no part of reinsurance premium income could be attributable to them, and the Commissioner's exercise of 26 U. S. C. § 482 authority to allocate income of controlled corporations was not warranted. Commissioner v. First Security Bank of Utah, p. 394.

3. *Required purchase of stock in Banks for Cooperatives—Capital assets.*—Purchase of Class C stock of Banks for Cooperatives, required of a borrower by the Farm Credit Act, was acquisition of capital asset having a long-term value, and cost was not an amount "contracted to pay for the use of the borrowed money," and thus was not deductible as interest. United States v. Mississippi Chemical Corp., p. 298.

TAX REFUNDS. See **Taxes**, 1.

TENANTS. See **Constitutional Law**, III, 4; V, 2–3.

TENNESSEE. See **Constitutional Law**, V, 4.

TERMINATION OF BENEFITS. See **Social Security Act.**

TERRITORIAL LICENSES. See **Antitrust Acts**, 4.

TESTIMONY. See **Constitutional Law**, II; III, 6; VII, 1.

TEXAS. See **Constitutional Law**, V, 7; **Elections**, 2; **Jurisdiction**, 2; **Procedure**, 7; **Removal**; **Stay.**

TRADEMARKED ITEMS. See **Antitrust Acts**, 4.

TRADE NAMES. See **Antitrust Acts**, 2.

TRADING STAMPS. See **Federal Trade Commission**; **Procedure**, 4.

TRAVEL. See **Airports**; **Constitutional Law**, I; V, 4.

TREASURY REGULATIONS. See **Banks**; **Taxes**, 2.

TREATMENT OF SEX OFFENDERS. See **Habeas Corpus**, 3; **Procedure**, 5.

TRIALS. See **Constitutional Law**, III, 3–4, 6; VI, 1; VII, 1; **Removal.**

UNCONSTITUTIONAL ON ITS FACE. See **Appeals**; **Confession of Judgment**, 2; **Constitutional Law**, III, 2.

UNFAIR LABOR PRACTICES. See **National Labor Relations Act.**

UNFAIR METHODS OF COMPETITION. See **Federal Trade Commission; Procedure,** 4.

UNION ACTIVITY. See **National Labor Relations Act.**

UNITED STATES ATTORNEYS. See **Constitutional Law,** III, 6.

UNMARRIED PERSONS. See **Constitutional Law,** III, 7; **Procedure,** 1; **Standing,** 2.

UNWED FATHERS. See **Constitutional Law,** III, 7.

UPHOLD AND DEFEND THE CONSTITUTION. See **Constitutional Law,** III, 5; **Loyalty Oaths.**

USE CHARGES. See **Airports; Constitutional Law,** I.

VAGINAL FOAM. See **Constitutional Law,** V, 1; **Standing,** 2.

VAGRANCY. See also **Constitutional Law,** III, 3.

1. *Florida vagrancy statute—"Wandering or strolling around"—Vagueness.*—Petitioners' convictions for violations of Florida vagrancy statute for "wandering or strolling around from place to place without any lawful purpose or object" are vacated and case remanded for reconsideration in light of *Papachristou* v. *City of Jacksonville, ante,* p. 156. Smith v. Florida, p. 172.

2. *Jacksonville, Florida, ordinance—Void for vagueness.*—The ordinance is void for vagueness, in that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," it encourages arbitrary and erratic arrests and convictions, it makes criminal activities which by modern standards are normally innocent, and it places almost unfettered discretion in the hands of the police. Papachristou v. City of Jacksonville, p. 156.

VAGUENESS. See **Constitutional Law,** III, 3, 5; VI, 1; **Obscenity; Vagrancy,** 1–2.

VOID FOR VAGUENESS. See **Constitutional Law,** III, 5; **Vagrancy,** 2.

VOTING. See **Constitutional Law,** IV; V, 4.

WAIVER OF COUNSEL. See **Habeas Corpus,** 1.

WAIVER OF NOTICE AND HEARING. See **Appeals; Confession of Judgment,** 1–2; **Constitutional Law,** III, 1–2.

WAIVERS. See **Habeas Corpus,** 1, 3; **Procedure,** 5.

WANDERING. See **Vagrancy**, 1–2.

WARDS OF STATE. See **Constitutional Law**, III, 7.

WASHINGTON. See **Obscenity.**

WELFARE REGULATIONS. See **Procedure**, 1; **Social Security Act.**

WHEELER-LEA ACT OF 1938. See **Federal Trade Commission**; **Procedure**, 4.

WHOLESALING. See **Antitrust Acts**, 4.

WISCONSIN MENTAL HEALTH ACT. See **Habeas Corpus**, 3; **Procedure**, 5.

WITNESSES. See **Constitutional Law**, II; III, 6; **Procedure**, 2.

WOMEN. See **Constitutional Law**, V, 5–6; **Juries.**

WORK TIME. See **Fair Labor Standards Act.**